

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2001

Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause

David Rudovsky

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Criminology and Criminal Justice Commons](#), and the [Law Enforcement and Corrections Commons](#)

Repository Citation

Rudovsky, David, "Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause" (2001). *Faculty Scholarship at Penn Law*. 933.

https://scholarship.law.upenn.edu/faculty_scholarship/933

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

ARTICLES

LAW ENFORCEMENT BY STEREOTYPES AND SERENDIPITY: RACIAL PROFILING AND STOPS AND SEARCHES WITHOUT CAUSE

*David Rudovsky**

I. INTRODUCTION

On a summer evening in 1991, four young African-Americans were driving on I-95, returning to Delaware from a church service in Philadelphia.¹ Although the driver had committed no traffic violations, the car was stopped just south of the Philadelphia International Airport by police officers from Tinicum Township.² The officers ordered the occupants out of the vehicle and proceeded to subject them, and the vehicle, to an intrusive search that included the use of a narcotics trained-police dog.³ They were detained for almost an hour until the police were convinced that they were not transporting drugs.⁴ To justify the initial stop, an officer issued a "warning" regarding an alleged obstruction of the car's windshield (a thin piece of string hanging from the rear view mirror, which could not have been observed by the officer before the stop).⁵ In response to a question from one of the occupants of the car as to why they had been stopped, the officer answered with surprising candor: "because you are young, black and in a high drug-trafficking area, driving a nice car."⁶

* David Rudovsky is a Senior Fellow at the University of Pennsylvania Law School. He is a founding partner in Kairys, Rudovsky, Epstein, Messing & Rau. I am grateful for the comments and suggestions provided by Seth Kreimer, Leonard Sosnov, Susan Herman, Paul Messing, Michael Avery and the members of the Legal Studies Workshop at the University of Pennsylvania Law School. Susan Marcus provided excellent research assistance and David Rush was a resourceful Journal editor. And a word of gratitude to my colleagues who have been litigating the issues covered in this Article, with special thanks to Stefan Presser, Alan Yatvin, and Reginald Shuford. Finally, by way of disclosure, I am counsel on some of the cases discussed in this article.

¹ *Wilson v. Tinicum Township*, No. Civ. A. 92-6617, 1993 WL 280205, at *2 (E.D. Pa. July 20, 1993) (Opinion on Class Action Certification).

² *Id.*

³ *Id.*

⁴ Ann Stewart, *Black Motorists Sue Police for Stopping Them on Highway*, GANNETT NEWS SERVICE, Nov. 19, 1992, available at 1992 WL 9397933.

⁵ See *Wilson* 1993 WL 280205, at *2.

⁶ *Id.* As to the officer's statement, see *Wyoming v. Houghton*, 526 U.S. 295, 298 (1999)

On a summer afternoon in August 1998, U.S. Army Sergeant Rosano Gerald and his young son Gregory were driving across Oklahoma.⁷ A career soldier and highly decorated veteran of Desert Storm, Gerald, a black man, was stopped twice within thirty minutes.⁸ As a report on the incident noted, "[d]uring the second stop, which lasted two-and-half hours, the troopers terrorized [Sergeant] Gerald's 12-year-old son with a police dog, placed both father and son in a closed car with the air conditioning off and fans blowing hot air, and warned that the dog would attack if they attempted to escape."⁹

As the district court described the allegations:

Over the course of the two hour detention the troopers repeatedly searched the car, turning up nothing. Despite this, Trooper Perry removed parts of the headliner, floorboards, carpet, and other areas, causing \$1089.21 in damage to the car. Perry removed the passenger side floorboard, claiming the bolts looked funny, like military bolts. According to the body shop that repaired the car, the bolts were the factory-installed bolts. Throughout the search Perry and the second trooper accused Sergeant Gerald of running drugs and laundering money. Sergeant Gerald denied the allegations and informed the troopers that his vehicle had recently passed inspection and had received military clearance. He also informed the troopers that due to the nature of his assignment he is subject to random urinalysis and did not use drugs.

At approximately 3:45 p.m., the troopers ceased their detention and prepared to let Plaintiffs leave with nothing but a warning ticket. When Sergeant Gerald complained his car and luggage were a mess, Perry informed him "We ain't good at repacking."¹⁰

On July 16, 1999, Alton Fitzgerald White, a leading African-American actor in the Broadway production of "Ragtime," was standing in the doorway of his apartment building in Manhattan, when police arrived.¹¹ He opened the door to allow them to enter.¹² He was immediately handcuffed and taken to the police district where he was strip searched and held in a cell—all without probable cause—until the police finally determined he had nothing to do with a call concerning "Hispanic men" selling drugs from the apartment house.¹³ Rather than being on stage, he found himself crying in a police holding cell, a circumstance dictated in no small part by the color of his

(suspect's admission made with "refreshing candor").

Gerald v. Oklahoma Dep't of Pub. Safety, CIV-99-676-R, slip op. at 1 (W.D. Okla. Dec. 21, 1999); ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS 3 (1999) [hereinafter ACLU REPORT]; Kevin Johnson, *ACLU Campaign Yields Race Bias Suit*, U.S.A. TODAY, May 19, 1999, at 4A.

⁸ ACLU REPORT, *supra* note 7; Johnson, *supra* note 7.

⁹ ACLU REPORT, *supra* note 7.

¹⁰ Gerald, slip op. at 6.

¹¹ Bob Herbert, *In America: Attention Must be Paid*, N.Y. TIMES, Sept. 30, 1999, at A29; Dinitia Smith, *Actor Resumes Role After Ordeal*, N.Y. TIMES, July 22, 1999, at B3.

¹² Smith, *supra* note 11.

¹³ *Id.*

skin.¹⁴

In 1997, Janneral Denson, an African-American woman returning from Jamaica to Fort Lauderdale, Florida, was pulled out of the arrival line by a U.S. Customs agent, taken to a local hospital, handcuffed to a bed rail and forced to drink four cups of a laxative.¹⁵ She protested that she was not carrying drugs and was seven months pregnant.¹⁶ Over twenty-four hours after her detention, when her bowels showed no sign of drugs, she was released.¹⁷ Eight days later, after severe diarrhea and bleeding, she underwent an emergency Caesarean.¹⁸ Her son was born weighing three pounds, four ounces.¹⁹ In a similar incident, Amanda Buritica was held for twenty-five hours, subjected to a full strip search, x-rays, and forced to swallow laxatives in what she termed was "the most degrading, humiliating thing I have been through."²⁰

In June of 1998, Curtis Rodriguez, a Latino attorney, was driving on Highway 152 near San Jose, California, and observed five traffic stops by state police, all of Latino drivers.²¹ He stopped to take photographs of two of these stops and was then followed and stopped by the state highway officers.²² When Rodriguez refused consent to search his car, the officer replied "I am in fear for my life," and proceeded to search the vehicle.²³ No contraband was found.²⁴

These incidents—stops, searches, and arrests without cause and of persons of color based on their race—are repeated thousands of times every year throughout the United States, and in too many instances reflect official police policy or practice. The "driving while black" phenomenon has been the subject of much scholarly and popular analysis, but for the most part these accounts of racial profiling have focused on highway stops and searches and have not addressed the role that race plays in pedestrian stop and frisk practices.²⁵ Moreover, while there is substantial commentary regarding

¹⁴ *Id.*

¹⁵ Stephen Barr, *Two Allege Racial Bias by Customs*, WASH. POST, May 21, 1999, A29.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Gary Webb, *DWB*, ESQUIRE, Apr. 1999, at 120; *see also* Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (addressing the litigation that resulted from these events).

²² Webb, *supra* note 21, at 120.

²³ *Id.*

²⁴ *Id.*

²⁵ *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 34-41 (1999) (discussing pretextual traffic stops of minority motorists); ACLU REPORT, *supra* note 7 (reporting on the problem of racial profiling during highway traffic stops); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) (discussing the discretionary nature of pretextual traffic stops and their discriminatory effect on minority motorists); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court

the Fourth Amendment standards that govern stop and frisk practices,²⁶ almost no attention has been given to the question of stops and frisks conducted without legal justification, independent from racial profiling concerns. Even if we could eliminate racial bias in street level policing, the problem of arbitrary stops and searches would still be present. Empirical studies demonstrate that while there is substantial operational and doctrinal overlap, the dual problems of racial profiling and stops and searches without adequate cause deserve separate consideration.²⁷

Consider the following recent studies:

In New Jersey, litigation and governmental investigations concerning allegations of racial profiling on the New Jersey Turnpike provide comprehensive and compelling data demonstrating a long standing

and *Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997) [hereinafter Harris, *Driving While Black*] (discussing the effects of *Whren v. United States* on pretextual traffic stops); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) [hereinafter Harris, *The Stories*] (discussing the experiences of African-American drivers who were stopped for pretextual traffic violations); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983) (discussing the interplay between the determination of probable cause and race); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998) (discussing the validity of consent interrogations that occur after a traffic stop in the state of Ohio); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) [hereinafter Maclin, *Race*] (discussing the role of race during pretextual traffic stops); Reginald T. Shuford, *Anyway You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371 (1999); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (discussing the effect of traffic stops of minority motorists on Fourth Amendment jurisprudence); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (discussing the constitutional and policy implications of racially motivated searches and seizures); Jennifer A. Larrabee, Note, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291 (1997) (arguing that the Equal Protection Clause of the Fourteenth Amendment should bar the consideration of race when police decide who to detain for a traffic violation); Henry Louis Gates, Jr., *Thirteen Ways of Looking at A Black Man*, THE NEW YORKER, Oct. 23, 1995, at 56, 58-59 (discussing "war stories" of famous African-American men stopped by police).

Courts have also addressed the issue. For example, the Ninth Circuit described a series of stops of African-American celebrities:

The police . . . erroneously stopped businessman and former Los Angeles Laker star Jamaal Wilkes in his car and handcuffed him, and stopped 1984 Olympic medalist Al Joyner twice in the space of twenty minutes, and once forcing him out of his car, handcuffing him and making him to lie spread-eagled on the ground at gunpoint. Similarly, actor Wesley Snipes was taken from his car at gunpoint, handcuffed, and forced to lie on the ground while a policeman knelt on his neck and held a gun to his head. Actor Blair Underwood was also stopped in his car and detained at gunpoint. We do not know exactly how often this happens to African-American men and women who are not celebrities and whose brushes with the police are not deemed newsworthy.

Washington v. Lambert, 98 F.3d 1181, 1182, n.2 (9th Cir. 1996) (citations omitted). See also, *Price v. Kramer* 200 F.3d 1237, 1240 (9th Cir. 2000) (sustaining award of \$245,000 to two African-Americans stopped and abused by police).

²⁶ See *infra* notes 122-145 and accompanying text.

²⁷ I use the term racial profiling to mean any stop, search, or arrest of a person based in whole or in part on the race of the suspect, except where police are acting on a racial description of the perpetrator of a crime. Arbitrary stops, searches, or arrests refer to police investigatory practices without the requisite cause or suspicion required by the Fourth Amendment.

pattern of racial profiling. In criminal litigation arising from drug arrests on the Turnpike, a court found substantial evidence that stops and searches on the Turnpike were highly disproportionate based on race.²⁸ The court determined that approximately 15% of all drivers on the Turnpike were minorities, that virtually all drivers violated the traffic laws (and in particular for speeding), and that blacks and whites violated traffic laws at almost exactly the same rate, but that 42% of stops and 73.2% of arrests were of blacks motorists, resulting in respective disparities of 16.35 and 54.2 standard deviations.²⁹ Further, the court found that while radar stops were relatively consistent with the percentage of minority violators, discretionary stops (made by patrol officers involved in drug interdiction) resulted in double the number of stops of minorities.³⁰ Of all stops resulting in the issuance of a traffic citation, 88% involved cars with a minority driver or passenger and 63% involved a black male 30 years or younger.³¹

A study conducted by the Attorney General of New Jersey confirmed and expanded upon these findings. The Attorney General determined that searches of cars on the Turnpike were even more racially disparate than the initial stops: 77.2% of all "consent" searches were of minorities and blacks.³² The Attorney General concluded that the use of arrest statistics could not justify racially disparate stops and searches, as those arrests were the product of racially discriminatory law enforcement practices.³³

In Volusia County, Florida, where Sheriff's cars were fitted with video cameras that recorded routine traffic stops, 148 hours of videotape documenting over 1,000 stops of cars on a stretch of I-95 where 5% of the drivers were African-American or Latino, revealed that nearly 70% of the persons stopped by the police were minorities.³⁴

In Illinois, the state police initiated a drug interdiction program ("Operation Valkyrie") in which they used aggressive enforcement of traffic laws on interstates to stop motorists and then examine them and their cars for indicators of drug trafficking.³⁵ A statistical study of the racial impact of these stops on Hispanic drivers showed the fol-

²⁸ *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (noting that the statistical disparities between African-American and white motorists stopped for traffic offenses were "stark").

²⁹ *Id.* at 352-55; Harris, *The Stories*, *supra* note 25, at 278-90.

³⁰ *Soto*, 734 A.2d at 354.

³¹ *Id.* at 356.

³² PETER VERNIERO, ATTORNEY GENERAL OF NEW JERSEY, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 26-28 (Apr. 20, 1999), available at http://www.state.nj.us/lps/intm_419.pdf [hereinafter INTERIM REPORT OF ATTORNEY GENERAL OF NEW JERSEY].

³³ *Id.* at 67-68.

³⁴ Jeff Brazil & Steve Berry, *Color of Drivers is Key to Stops on I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A-1; Harris, *Driving While Black*, *supra* note 25, at 561-62.

³⁵ ACLU REPORT, *supra* note 7, at 27.

lowing.³⁶

While Hispanics comprise less than 8% of the Illinois population, and take fewer than 3% of the personal vehicle trips in Illinois, they comprise approximately 30% of the motorists stopped by drug interdiction officers for discretionary offenses such as failure to signal a lane change or driving one to four miles over the speed limit.³⁷

Troopers assigned to Valkyrie teams stop Hispanic motorists for traffic violations two or three times more frequently than other troopers patrolling the same highways and charged with enforcing the same laws.³⁸ For example, in three counties in northern Illinois, where Hispanics comprise less than 3% of the local driving-age population, Hispanics make up 25% of the persons stopped by Valkyrie officers, while the rate for non-Valkyrie officers is 8%.³⁹

While Hispanics comprise 27% of the searches conducted by Valkyrie officers, troopers find contraband in a lower percentage of the vehicles of Hispanic motorists than in the vehicles of white motorists.⁴⁰

Statistical studies conducted of car and pedestrian stops in Philadelphia also demonstrate patterns of stops without cause and racial profiling.⁴¹ For a one-week period in July, 1999, for car and pedestrian stops made in predominantly white police districts, the ratio of African-Americans who were stopped was up to ten times higher than one would expect from population data.⁴² In predominantly minority police districts, stops were closely aligned to population data.⁴³ Further, one-third of all pedestrian stops were made without sufficient written explanation.⁴⁴

³⁶ *Id.* The statistical evidence is set forth in Plaintiffs' Experts' Reports, *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053, 1069 (N.D. Ill. 1998) (No. 94 C 5307) (on file with author).

³⁷ ACLU REPORT, *supra* note 7, at 27.

³⁸ *Id.* at 28.

³⁹ *Id.*

⁴⁰ *Id.* at 27-28. In the highway drug interdiction field, a little known federal program, "Operation Pipeline," financed by the Drug Enforcement Agency (DEA) and administered by over 300 state and local law enforcement agencies, has had substantial influence on profiling practices. Gary Webb, *DWB*, ESQUIRE, Apr. 1999, at 118. The DEA has trained thousands of officers in drug interdiction practices that rely heavily on pretextual traffic stops of "suspicious" vehicles. *Id.* at 123-24. This "volume" approach to law enforcement sweeps an overwhelming number of innocent drivers. In 1997, the California Highway Patrol stopped 34,000 cars and ultimately seized contraband in 2% of these stops. *Id.* at 122. As one California Highway Patrol sergeant explained, "[i]t's sheer numbers Our guys make a lot of stops. You've got to kiss a lot of frogs before you find a prince." *Id.*

⁴¹ Plaintiffs' Fourth Monitoring Report, Pedestrian and Car Stop Audit, NAACP v. City of Philadelphia, C.A. No. 96-CV-6045 (E.D. Pa. July, 1998) [hereinafter Fourth Philadelphia Report]; Plaintiffs' Fifth Monitoring Report, Pedestrian and Car Stop Audit, NAACP v. City of Philadelphia, C.A. No. 96-CV-6045 (E.D. Pa. Dec. 7, 2000) [hereinafter Fifth Philadelphia Report].

⁴² Fifth Philadelphia Report, *supra* note 41, at 9-10, 22-26.

⁴³ *Id.* at 20-25.

⁴⁴ *Id.* at 13-14.

In Ohio, a study of the traffic ticketing of several police departments demonstrated that African-Americans were two to three times more likely to receive traffic tickets than their white counterparts.⁴⁵

The Attorney General of New York conducted a study of 175,000 pedestrian stops by the New York City Police Department and found a highly disproportionate rate of stops of minorities.⁴⁶ The Attorney General determined that (1) African-Americans were stopped six times more frequently than whites,⁴⁷ (2) in precincts with a white population of 80% or more and where African-Americans constitute 10% or less of the population, stops of African-Americans comprised 30% of all stops, more than ten times their percentage of the population,⁴⁸ (3) stops of African-Americans were less likely to result in arrests than stops of whites,⁴⁹ and (4) adjusting for crime rates by race, the differences in stops of minorities compared to stops of whites is statistically significant, with African-Americans stopped twice as often as whites.⁵⁰

The Attorney General also reported that where a full factual statement concerning the stop was provided by the police, 15.4% of the stops failed to comply with Fourth Amendment standards.⁵¹ In addition, 23.5% of the stops failed to provide a sufficient factual basis, on their face, to determine whether the stop was constitutionally proper.⁵² Stops by the elite "Street Crime Unit" (that was involved in the death of Amadou Diallo)⁵³ based on suspicion of possession of a weapon, yielded a weapon in only 2.5% of all stops.⁵⁴

The Massachusetts Attorney General investigated claims of racial bias and illegal stops in Boston and reported:

We conclude that Boston police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals Although we cannot say with precision how widespread this illegal conduct was we believe that it was sufficiently common to justify changes in certain Department practices.

Perhaps the most disturbing evidence was that the scope of a number of *Terry* searches went far beyond anything authorized by that case and in-

⁴⁵ Harris, *The Stories*, *supra* note 25, at 281-88.

⁴⁶ OFFICE OF THE ATTORNEY GENERAL OF NEW YORK STATE, REPORT ON THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 88-89 (1999), available at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html [hereinafter REPORT OF ATTORNEY GENERAL OF NEW YORK].

⁴⁷ *Id.* at 95.

⁴⁸ *Id.* at 105-06.

⁴⁹ *Id.* at 111.

⁵⁰ *Id.* at 121, 126.

⁵¹ *Id.* at 160-62.

⁵² *Id.* at 162-64.

⁵³ Amadou Diallo was shot and killed on February 4, 1999 when four officers mistook a wallet he was holding for a gun and fired 41 shots at him. The officers were acquitted of criminal charges in February, 2000. See *infra* notes 223-225 and accompanying text.

⁵⁴ REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 117 n.23.

deed, beyond anything that we believe would be acceptable under the federal and state constitutions even where probable cause existed to conduct a full search incident to an arrest. Forcing young men to lower their trousers, or otherwise searching inside their underwear, on public streets or in public hallways, is so demeaning and invasive of fundamental precepts of privacy that it can only be condemned in the strongest terms. The fact that not only the young men themselves, but independent witnesses complained of strip searches, should be deeply alarming to all members of this community.⁵⁵

Stops and searches by customs officials also disclose racial bias. In 1998, there were approximately 52,000 people selected for body searches (ranging from hand frisks to strip and cavity searches) by customs officials.⁵⁶ No contraband was found in 96% of these searches and almost half of all persons selected for search were African-American or Latino.⁵⁷ Further in 1998, black women were nine times more likely than white women to be subjected to x-rays, yet they were less than half as likely to be found carrying contraband as their white counterparts.⁵⁸

The powerful combination of governmental investigations, judicial findings, anecdotal evidence, and statements by law enforcement officials leave little doubt about the existence of racial profiling and other stops without cause.⁵⁹ In December, 1999, a Gallup poll found that 56% of whites and 77% of blacks believe racial profiling to be widespread.⁶⁰ Almost three-quarters of all young black men polled believed that they had been stopped based on their race.⁶¹ In June, 1999, President Clinton condemned this practice as "morally indefensible" and requested record-keeping and studies to determine the extent of racial profiling in law enforcement.⁶²

⁵⁵ JAMES M. SHANNON, ATTORNEY GENERAL OF MASSACHUSETTS, REPORT OF THE ATTORNEY GENERAL'S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES 60-61 (Dec. 18, 1990).

⁵⁶ U.S. GENERAL ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 2, 40 (Mar., 2000). See also, *Anderson v. Cornejo*, No. 97 C 7556, 1999 U.S. Dist. LEXIS 519 (N.D. Ill. Jan. 11, 1999) (denying class certification of African-American women who claimed that they were improperly searched when going through customs at O'Hare International Airport).

⁵⁷ UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 56, at 40.

⁵⁸ *Id.* at 2.

⁵⁹ E.g., Lassiter, *supra* note 25, at 115-19 (listing studies, newspaper articles, and reports). For additional data, see Tanya Albert, *Chief Acknowledges Racial Profiling*, CINCINNATI ENQUIRER, Feb. 1, 2000, at 1; Barbara Whitaker, *San Diego Police Found to Stop Black and Latino Drivers Most*, N.Y. TIMES, Oct. 1, 2000, § 1, at A31.

⁶⁰ Will Lester, *Americans Think Racial Stops are Widespread*, PHILA. INQUIRER, Dec. 11, 1999 at A14. In a survey of Philadelphia residents, the Pew Center for Civil Journalism found that 60% of whites, but only 39% of blacks believed that the police "treat everyone the same." Chris Brennan, *Crime is a Local Concern*, PHILA. DAILY NEWS, Feb. 11, 2000, at 12.

⁶¹ Lester, *supra* note 60.

⁶² E.g., Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 51. On January 17, 2000, Democratic Presidential candidates Al Gore and Bill Bradley promised to end racial profiling if elected as President. *Excerpts From Bradley-Gore Debate in Des Moines*, N.Y. TIMES, Jan. 18, 2000, at A20.

It may seem curious that the President would have to order federal law enforcement agencies to collect and analyze data on the racial characteristics of stops and searches. After all, law enforcement places heavy reliance on car and pedestrian stops as part of proactive, order—maintenance policing,⁶³ and the courts have vested broad discretion in the police in these areas.⁶⁴ Further, police and prosecutorial agencies maintain comprehensive data on reported crime, arrests and convictions, with specific documentation concerning race.⁶⁵

The failure of most law enforcement agencies to collect and analyze data concerning car and pedestrian stops, or to conduct comprehensive reviews of the legality of stops and searches—as to both racial profiling and stop and searches made without cause, regardless of race—has undermined efforts to make sound empirical judgments. Many police agencies have authorized or tolerated racial profiling and random, suspicionless stops and searches, as part of policing programs that operate on the theory that the more stops and searches that are conducted, whether in compliance with the Constitution or not, more drugs, weapons, and intelligence will be secured.⁶⁶ Law enforcement is well aware that it is far easier to discount anecdotal evidence of constitutional violations than it is to rebut statistical data that reflect entrenched patterns of unlawful practices.⁶⁷

Without hard data to prove that racial profiling and random stops are integral parts of street level policing, the police have every reason to be confident that if an improper stop is made there will likely not be any negative consequences. If contraband is recovered, it will be confiscated regardless of the legality of the stop or search. Moreover, factual assertions sufficient to justify the stop and search can be cre-

⁶³ See *infra* notes 64 and 76 and accompanying text.

⁶⁴ For commentary on community policing, police discretion, and constitutional limits, see David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999) (discussing legal scholarship supporting police discretion); Dan M. Kahan & Tracy L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (discussing the constitutional scrutiny used to evaluate community policing); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551 (1997) (critiquing police discretion in community policing); Tracey Maclin, *What Can Fourth Amendment Doctrine Learn From Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 399 (2001); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) (arguing that order-maintenance policing can reinforce racist presumptions regarding the criminal behavior of minorities).

⁶⁵ E.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1997 (Kathleen Maguire & Ann L. Pastore eds., 1997). Moreover, with the increase of “hate-crime” legislation, law enforcement officials must analyze certain criminal conduct from the perspective of race and must keep records that reflect the race (and other statutorily covered characteristics) of victims and alleged offenders.

⁶⁶ See *infra* note 76 and accompanying text.

⁶⁷ For an interesting analysis of the ways in which the courts and other institutions have avoided confronting institutional patterns of misconduct by reducing evidence to anecdotes, see Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1307-09 (1999).

ated to avoid the exclusionary rule or other sanctions. Even if nothing is found, the person stopped is highly unlikely to pursue any administrative or legal remedies.⁶⁸ To the degree that empirical evidence undermines these claims, law enforcement's broad discretionary powers and the practice of stopping as many cars and pedestrians as possible are placed in some jeopardy.

Police officials have fought legislative initiatives that would require record-keeping regarding the racial characteristics of police stops and searches.⁶⁹ Out of twenty states in which legislation has been drafted that would require data collection and analysis, only five have imposed these requirements.⁷⁰ On the federal level, the House of Representatives passed the Traffic Stops Statistics Study Act of 1998, authorizing the collection and analysis of information relating to the age, race, and ethnicity of drivers stopped by the police.⁷¹ Law enforcement agencies lobbied hard against this legislation, asserting that the data would be misused or misinterpreted and would adversely affect law enforcement.⁷² The bill failed to gain Senate ap-

⁶⁸ See *infra* notes 359-361 and accompanying text.

⁶⁹ Kevin Johnson & Gary Fields, *Police Chiefs Resist Race-Related Tallies*, USA TODAY, Apr. 8, 1999, at 7A; Robert L. Jackson, *Push Against Bias in Traffic Stops Arrested*, L.A. TIMES, June 1, 1998, at A5.

⁷⁰ See ACLU REPORT, *supra* note 7, at 39-40; Harris, *The Stories*, *supra* note 25, at 321-22. Currently, Missouri, Connecticut, North Carolina, Washington, and Kansas require data collection. See *supra* note 70.

⁷¹ H.R. 118, 105th Cong. § 1 (1998). The Act provided that:

The Attorney General shall conduct a study of stops for routine traffic violations by law enforcement officers. Such study shall include collection and analysis of appropriate available data. The study shall include consideration of the following factors, among others:

- (1) The number of individuals stopped for routine traffic violations.
- (2) Identifying characteristics of the individual stopped, including the race and or ethnicity as well as the approximate age of that individual.
- (3) The traffic infractions alleged to have been committed that led to the stop.
- (4) Whether a search was instituted as a result of the stop.
- (5) How the search was instituted.
- (6) The rationale for the search.
- (7) Whether any contraband was discovered in the course of the search.
- (8) The nature of such contraband.
- (9) Whether any warning or citation was issued as a result of the stop.
- (10) Whether an arrest was made as a result of either the stop or the search.
- (11) The benefit of traffic stops with regard to the interdiction of drugs and the proceeds of drug trafficking, including the approximate quantity of drugs and value of drug proceeds seized on an annual basis as a result of routine traffic stops.

⁷² See *supra* note 69 and accompanying text. In 1999 the International Association of Chiefs of Police ("IACP") announced its opposition to "proactive traffic enforcement that is race or ethnic-based," but defined such activity as stops and searches made "simply because of race," and refused to endorse federal legislation requiring maintenance of data on these practices. IACP, Recommendations from the First IACP Forum on Professional Traffic Stops 2-8 (Apr. 6, 1999) (on file with author). The IACP recommended "voluntary" local efforts to collect data on traffic stops. *Id.* at 7-8. At a conference called by the Attorney General of the United States, "Strengthening Police-Community Relationships," in June 1999, several police officials opposed data collection regarding racial characteristics of car stops, expressing concerns about cost, officer integrity in collecting the data, "legal questions" concerning asking drivers questions about race, and use of the data in performance and other officer evaluations. U.S. DEP'T OF JUSTICE,

proval.⁷³

The systematic collection and analysis of data pertaining to police stops and searches, including the often ignored pedestrian stops,⁷¹ is an essential component of any long term reforms of these practices. However, the fact that all police departments do not maintain this data cannot excuse law enforcement agencies or the courts from exercising their powers to remedy current unlawful or misinformed policies. Studies and litigation consistently demonstrate significant racial disparities and the failure to act cannot be rationalized on a "lack of data" theory. Unfortunately, while we might expect that "morally indefensible"⁷⁵ and "deeply corrosive" practices would be taken seriously by governmental agencies and the courts, experience to date does not meet that expectation.

To explore these issues, this article considers the legal and social ramifications of racial profiling and random police stops and searches. In Part II, I discuss the justifications provided for the continued disparate treatment of African-Americans and other racial minorities in drug, weapons, and quality of life law enforcement. In Part III, I review the relevant federal constitutional and statutory law, including Fourth and Fourteenth Amendment standards, as it applies to the different policing practices involved in car and pedestrian stops. Part IV presents an analysis of the remedial framework. In Part V, I recommend legislative, administrative, and judicial reforms.

II. RACIAL PROFILING: THE LAW ENFORCEMENT JUSTIFICATIONS

The debate over racial profiling has shifted ground. Virtually everyone agrees that it is impermissible to stop or search someone *solely* on the basis of race. However, the extent and pervasiveness of this practice is sharply disputed. While there has been a movement towards exclusion of race as a legitimate factor in any police stop or

SUMMARY REPORT OF ATTORNEY GENERAL'S CONFERENCE: STRENGTHENING POLICE-COMMUNITY RELATIONSHIPS 35 (June 1999) (on file with author).

The Department of Justice currently supports collection and maintenance of this data, but for many years declined the authority to do so. See Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality when the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 274 n.4 (1994) (noting that the Justice Department, while conducting a study of police brutality on its own, had previously opposed legislation requiring similar studies because of fears that such measures would hamper efforts to improve local police agencies).

⁷³ Harris, *The Stories*, *supra*, note 25, at 276; Alan Jenkins, *See No Evil*, THE NATION, June 28, 1999, at 15. On March 1, 2000, the House Judiciary Committee approved an updated version of the racial profiling legislation. 146 CONG. REC. H 930 (2000); H.R. 1443, 106th Cong. § 1 (1999). See also, Hearing on S. 821, 106th Cong. § 1 (1999), Subcommittee on Constitution, Federalism, and Property Rights, 146 CONG. REC. D292 (2000).

⁷⁴ While most of the recent attention has focused on the "driving while black" phenomenon, racial bias in pedestrian stops, and the problem of random stops regardless of race present equally serious challenges. See *infra* Part III.

⁷⁵ See *supra* text accompanying note 62.

search, unless in response to a description of a suspect, many law enforcement officials and courts continue to assert that race is a legitimate factor in policing decisions, even where there is no specific racial description of a suspect. The racially disparate impact of police practices are defended on a number of grounds: (1) that minorities commit more crime than whites, which explains and justifies, at least in part, the racial disparities that appear in data concerning stops, searches, and arrests; (2) that enforcement of criminal laws that are violated by whites and minorities in roughly proportionate numbers is disproportionate as to minorities because the location and social impact of the same types of crimes justifies a more aggressive response in minority communities; and (3) that current practices work: aggressive policing and targeting of minority communities, with increased numbers of pedestrian and car stops and searches, has led to a significant number of seizures of contraband, weapons, and fugitives, and a reduction of crime.⁷⁶

⁷⁶ The debates over "broken window" theories, zero tolerance of "quality of life" crimes, drug enforcement policies and aggressive patrol tactics reveal deep philosophical and operational divides. On the policing practices, see, for example WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC* (1998) (discussing Bratton's role in reducing crime as New York City's Police Commissioner); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW*, 138-63 (1998) (discussing police use of race as an indication of increased risk of criminality); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1168-69 (1996) (discussing the history and legal responses to chronic street nuisances); Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171 (1999) (discussing the policing practices introduced in New York City by police commissioner William Bratton); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (using empirical data to critique New York City's quality-of-life initiative); Symposium, *Why is Crime Decreasing?* 88 J. CRIM. L. & CRIMINOLOGY 1173 (1998); Fox Butterfield, *Rethinking the Strong Arm of the Law*, N.Y. TIMES, Apr. 4, 1999, § 4 (Week in Review), at 1 (promoting community policing as an alternative to the zero tolerance approach taken in New York City); Michael Massing, *The Blue Revolution*, NEW YORK REVIEW OF BOOKS, Nov. 19, 1998, at 32 (reviewing several books discussing crime and the application of the broken windows theory); James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, Mar. 1982 (discussing police foot patrols and other efforts to improve community policing).

Claims that aggressive policing, including pretextual car stops, stop and frisks of pedestrians, and zero tolerance of low level criminal conduct have caused a reduction in crime are much disputed. For the proponents' view, see BRATTON & KNOBLER, *supra*; Greene, *supra*. See also William J. Bratton, *Why Lowering Crime Didn't Raise Trust*, N.Y. TIMES, Feb. 25, 2000, at A19 (suggesting that the reduction in crime rates in New York City was the result of assertive policing strategies). Critics of this view dispute the effectiveness, necessity and legality of these practices. E.g., Harcourt, *supra*; COLE, *supra* note 25; Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1 (comparing crime reduction rates by city and types of policing and reporting more reductions in "community oriented" policing in San Diego than in New York City); Roberts, *supra* note 64, at 811 ("In the same way that minor infractions of order . . . can allegedly lead to serious crime, minor infringements of citizens' liberties can cause serious damage to the relationship between government and the governed . . ."). Indeed, if the broken windows theory is correct, it is fair to ask why police officials who advocate order-maintenance policing as the way to effectuate this theory are not equally vigilant in attempting to end low level abuses of citizens by police to prevent the more

As stated by one commentator, based on his interviews with and observations of police officers:

This is what a cop might tell you in a moment of reckless candor: in crime fighting, race matters. When asked, most cops will declare themselves color blind. But watch them on the job for several months, and get them talking about the way policing is really done, and the truth will emerge, the truth being that cops, white and black, profile . . . [They say] African-Americans commit a disproportionate percentage of the types of crimes that draw the attention of the police. Blacks make up 12 percent of the population, but accounted for 58 percent of all carjackers between 1992 and 1996. (Whites accounted for 19 percent.) Victim surveys—and most victims of black criminals are black—indicate that blacks commit almost 50 percent of all robberies. Blacks and Hispanics are widely believed to be the blue-collar backbone of the country's heroin—and cocaine—distribution networks. Black males between the ages of 14 and 24 make up 1.1 percent of the country's population, yet commit more than 28 percent of its homicides. Reason, not racism, cops say, directs their attention.

Cops, white and black, know one other thing: they're not the only ones who profile. Civilians profile all the time—when they buy a house, or pick a school district, or walk down the street.⁷⁷

These observations reflect widely held views—within and without law enforcement circles—that African-Americans and other minorities commit a disproportionate number of crimes and, therefore, they are justifiably targeted not only where race is part of a reported criminal incident, but also in situations where police have a wide range of possible targets (e.g., pretextual traffic stops) or where their suspicion of criminal activity would not otherwise justify a stop or search.⁷⁸

In the context of drug interdiction car stops, these defenses of racial profiling do not withstand empirical and legal scrutiny.⁷⁹ First,

serious abuses that will surely follow under this theory of human behavior.

⁷⁷ Goldberg, *supra* note 62, at 51.

⁷⁸ See Thompson, *supra* note 25, at 999 (discussing the view in DINESH D'SOUSA, *THE END OF RACISM, PRINCIPLES FOR A MULTIRACIAL SOCIETY* 284 (1995), that using race as a proxy for suspicion may be a form of "rational discrimination"); KENNEDY, *supra* note 76, at 145 (acknowledging higher crime rates among African-Americans, but strongly condemning use of race in determining suspicion). It is important to analyze the data concerning crime and arrest rates, by type of crime and reporting systems. Thus, while arrest records and victimization studies demonstrate that blacks commit more homicides and robberies than whites, see BUREAU OF JUSTICE STATISTICS, *supra* note 65, at 338, drug arrest statistics are driven far more by law enforcement practices than actual use or distribution of drugs and, therefore, these statistics do not accurately measure the rate of "drug crimes." HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* (May, 2000), available at <http://www.hrw.org/reports/2000/usa/>.

⁷⁹ Race is an appropriate factor in stops where the police have been provided with a description of a criminal suspect. In the car stop context, however, descriptions are virtually never at play since almost all stops are made for alleged traffic violations. "Drug courier" profiles stops are made when there is no specific criminal information about any particular person. Pedestrian stops based on descriptions of alleged perpetrators were fewer than 30% of all stops in the

the empirical data does not support the notion of a minority-dominated drug trade. According to national drug abuse studies, minorities possess and use drugs just slightly more frequently than whites.⁸⁰ Former "Drug Czar" William J. Bennett has stated that "[t]he typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb."⁸¹ Drew S. Days, III, as Solicitor General, defended federal drug charging patterns, but has stated that "there appears to be a significant disparity" between drug usage by race and arrest rates.⁸² A recent study found that the rate of drug abuse among adolescents was significantly higher in rural as opposed to urban areas.⁸³ Thus, eighth graders in rural areas, who are far more likely to be white,⁸⁴ are 104% more likely to use amphetamines, 50% more likely to use cocaine, 83% more likely to use crack cocaine, and 34% more likely to use marijuana than their urban counterparts.⁸⁵

In response, law enforcement officials assert that whatever the rates for use and possession, *traffickers* and *couriers* are disproportionately black or Hispanic and, therefore, profiling on the highways is justified.⁸⁶ But there is scant data on the racial composition of high-

New York City study. REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 122 n.30.

⁸⁰ The Federal Substance Abuse and Mental Health Services Administration's 1997 National Household Survey on Drug Abuse found that the rate of illicit drug use for blacks was 7.5%, for whites, 6.4%, and for Hispanics, 5.9%. U.S. DEP'T OF HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE - 1997 (1997). See also, Sam Vincent Meddis, *Is the Drug War Racist?*, USA TODAY, July 23, 1993, at A1 (noting that while black and white drug use are nearly the same, the war on drugs has been fought mainly against blacks). As the Human Rights Watch has reported:

According to the most recent NHSDA [National Household Survey on Drug Abuse] survey, in 1998 there were an estimated 9.9 million whites (72 percent of all users) and 2.0 million blacks (15 percent) who were current illicit drug users in 1998. There were almost five times as many current white marijuana users as black and four times as many white cocaine users. Almost three times as many whites had ever used crack as blacks. Among those who had used crack at least once in the past year, 462,000 were white and 324,000 were black. Only among current crack users did the number of blacks exceed the number of whites - and this was a change from previous years in which the number of current white crack users had exceeded the number of black users. SAMHSA [Substance Abuse and Mental Health Services Administration] also estimated that in 1998 there were 4,934,000 whites who used marijuana on 51 or more days in the past year, compared to 1,102,000 blacks, and 321,000 whites who had used cocaine on 51 or more days in the past year compared to 171,999 blacks. (citations omitted).

HUMAN RIGHTS WATCH, *supra* note 78, at 20.

⁸¹ Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1.

⁸² Drew S. Days III, *Race and the Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 181, 186-87 (1996).

⁸³ Genaro C. Armas, *War on Drugs Needs to Reach Small Towns, Rural Areas, Study Says*, PHILA. INQUIRER, Jan. 27, 2000, at A9 (citing study released by the National Center on Addiction and Substance Abuse at Columbia University).

⁸⁴ U.S. Dep't of Commerce, Bureau of the Census, 1990 Census of Population (1990), available at <http://www.census.gov/prod/3/98pubs/CP1-U.S.PDF>.

⁸⁵ Armas, *supra* note 83 (citing study released by the National Center on Addiction and Substance Abuse at Columbia University). Among African-Americans, use of drugs has consistently run at lower levels than among whites. HUMAN RIGHTS WATCH, *supra* note 78, at 19-20.

⁸⁶ E.g., Meddis, *supra* note 80.

way drug traffickers or couriers. The former Chief of DEA could not be any more specific than his assertion that it is "probably safe to say whites . . . [constitute] the majority of traffickers."⁸⁷ Human Rights Watch has reported:

There are no comparable annual statistics on the estimated number and race of drug sellers nationwide. Nevertheless, such data as exists indicates whites constitute a far greater share of the drug selling population than of the population arrested for drug selling. For example, during the period 1991-1993, SAMHSA included questions about drug selling in the annual NHSDA surveys. Although the responses are best seen as a rough approximation of drug selling activity, they are nonetheless highly suggestive. On average over the three year period, blacks were 16 percent of admitted sellers and whites were 82 percent. According to research on patterns of drug purchase and use in selected major cities, drug users reported that their main drug sources were sellers of the same racial or ethnic background as they were. A large study conducted in the Miami, Florida metropolitan area of 699 cocaine users (power and crack) revealed that over 96 percent of the users in each ethnic/racial category were involved in street-level drug dealing, which again would suggest a racial profile of sellers that is comparable to that of users. General Barry McCaffrey has stated that drug transactions between youth are generally intra-racial, that is, youth tend to buy from sellers of the same race. ONDCP's [Office of National Drug Control Policy] former periodic report on drugs trends, *Pulse Check*, also indicated a high frequency of intra-racial drug transactions, that is, that whites tended to buy from white sellers and minorities from minority sellers.⁸⁸

Moreover, arrest statistics are notoriously misleading, particularly where profiling is practiced. The Attorney General of New Jersey directly addressed the assumption that minorities are disproportionately positioned among couriers, thus justifying highway racial profiling:

The evidence for this conclusion is, in reality, tautological and reflects as much as anything the initial stereotypes of those who rely upon these statistics. To a large extent, these statistics have been used to grease the wheels of a vicious cycle—a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.

The most obvious problem is relying on arrest statistics, of course, is that these numbers refer only to persons who were found to be involved in criminal activity (putting aside for the moment the presumption of innocence). Arrest statistics, by definition, do not show the number of persons who were detained or investigated who, as it turned out, were not found to be trafficking drugs or carrying weapons. Consistent with our human nature, we in law enforcement proudly display seized drug shipments or "hits" as a kind of trophy, but pay scant attention to our far

⁸⁷ *Id.*

⁸⁸ HUMAN RIGHTS WATCH, *supra* note 78, at 20-21.

more frequent "misses," that is, those instances where stops and searches failed to discover contraband. (Recall that among the universe of stops, searches are quite rare, and searches that reveal evidence of crime are rarer still.) Logically, of course, one cannot hope to judge the overall effectiveness of any practice or program by looking solely at its successes, any more than by looking only at its failures.⁸⁹

Empirical evidence gained from the review of car stops and searches supports this view. On the New Jersey Turnpike, seizures of contraband made incident to traffic stops were made at a rate of 10.5% from white drivers and 13.5% from black drivers.⁹⁰ In Maryland, searches on I-95 resulted in "find rates" that were roughly equal by race.⁹¹ In both states, the large majority of seizures were of rela-

⁸⁹ INTERIM REPORT OF ATTORNEY GENERAL OF NEW JERSEY, *supra* note 32, at 67-68. *See also*, *Developments in the Law - Race and the Criminal Process*, 101 HARV. L. REV. 1473, 1508 (1988) (asserting that use of arrest statistics to justify use of race creates self-fulfilling prophecy because it encourages the police to arrest minorities more frequently).

Empirical data regarding use of drug courier profiles at airports and other transportation hubs similarly expose the flaws in relying on factors unrelated to criminal conduct. *See, e.g.*, *United States v. Hooper*, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting) (noting that in an operation at the Buffalo Airport, police were "correct" in their stops in fewer than two percent of their profile encounters). Similar results mark other profile based investigations. *United States v. Montoya de Hernandez*, 473 U.S. 531, 557 (1985) (Brennan, J., dissenting) ("[T]he available evidence suggests that the number of highly intrusive border searches of suspicious-looking but ultimately innocent travelers may be very high."); *United States v. Montilla*, 733 F. Supp. 579, 580 (W.D.N.Y. 1990) (agents of the U.S. Drug Enforcement Agency observing bus passengers in New York made eighty stops per month, which resulted in only three to four arrests). *See also* *Florida v. Bostick*, 501 U.S. 429, 441-42 (1991) (Marshall, J., dissenting) (noting that only a small number of the numerous police sweeps for drugs actually result in a successful interdiction of drugs); Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 873-77 (1985) (noting the flaws in the drug courier profile when compared to the aircraft hijacker profile).

Professor David Cole has demonstrated how the drug courier profile can be manipulated to fit virtually any form of innocent activity of a person at an airport, including whether one is the first or the last to leave the plane, whether one appears nervous or calm, and whether one is dressed expensively or modestly. COLE, *supra* note 25, at 47-51. Further, his computer search of all federal cases involving drug courier profile stops over a four-year period showed that 80% of those stopped were minorities. *Id.* at 40.

In part, the approval of profile stops is a predictable consequence of the types of cases that actually reach the courts. For the most part, judges see only those cases in which drugs or other contraband are seized. In such cases, enormous pressure exists to ignore constitutional violations so as to avoid suppression of the evidence. In the thousands of cases where the individual stopped is innocent, even if that person was detained and searched illegally, it is unlikely that she will pursue legal remedies. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 244-45 (1993) (noting that individuals who have been searched illegally are unlikely to complain). Thus, the case law develops on a highly skewed notion of reality, subject to the distorting effect of discovery of contraband in the specific case. *See*, *Florida v. Riley*, 488 U.S. 445, 463 (1989) (Brennan, J., dissenting) ("It is difficult to avoid the conclusion that the plurality has allowed its analysis . . . to be colored by its distaste for the activity in which [the defendant was involved].").

⁹⁰ INTERIM REPORT OF ATTORNEY GENERAL OF NEW JERSEY, *supra* note 32, at 26-28.

⁹¹ Expert Reports of John Lamberth, Maryland State Conference of NAACP Branches v. Maryland Department of State Police, 72 F. Supp. 2d 560 (D. Md. 1999) (Civ. No. CCB-98-1098), available at <http://www.aclu.org/court/lamberth.html> (on file with author). *See also* Maclin, *Race*, *supra*, note 25, at 349-51 (1998) (noting that the percentage of traffic stops that

tively small amounts of drugs, indicating possession for personal use.⁹² In Illinois, searches of Hispanics yielded a lower percentage of narcotics than of whites.⁹³

Defenders of these practices have argued that the data does not disprove the assertion that the police are engaged in rational discrimination and efficient law enforcement practices in focusing on minority motorists. For example, a study of the Maryland I-95 searches concluded that the equal rates in the seizure of drug contraband from all African-American and white motorists who had been stopped and subjected to a search demonstrated that the "equilibrium" between these races was the product of police targeting of minority motorists who previously were transporting drugs at a significantly higher rate than whites.⁹⁴ The study is questionable on both methodological and legal grounds. First, as a statistical matter, the study assumes that the extremely small number of searches (compared to the motoring population and to the number of motorists actually stopped) was sufficient to deter African-American drivers from transporting drugs (there are no data to show the rate of transportation pre-racial profiling).⁹⁵ The study also assumes that the police are accurately reporting searches where nothing is recovered even though there is evidence to suggest the contrary.⁹⁶

Second, as a matter of constitutional law, the study proceeds on the theory that the police intentionally targeted African-American drivers for disproportionate stops and searches⁹⁷ (an assumption contradicted by the state police who have maintained that African-Americans have not been targeted). But even if there was solid evidence that African-Americans violated the drug laws on I-95 more often than whites, the state is prohibited from implementing formal sanctions that differentiate between the races. Thus, it would be unconstitutional for the state to enact criminal laws that provide for harsher prison terms for African-Americans convicted of the same drug offenses as whites, even in the face of an econometric model

resulted in the discovery of contraband was the same for black and white motorists).

⁹² See *supra* note 91; INTERIM REPORT OF ATTORNEY GENERAL OF NEW JERSEY, *supra* note 32, at 36-37 (noting that "major" drug seizures on the New Jersey Turnpike were rare).

⁹³ See *supra* notes 35-40 and accompanying text.

⁹⁴ John Knowles, et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence* 27 (Feb., 2000) (unpublished manuscript on file with author). The disparities in searches was profound: on a highway on which African-Americans constituted less than 20% of all drivers, of 1,590 searches, 1,007 African Americans were searched (63.4%) and 466 whites were searched (29.3%). *Id.* at 16. The remaining searches were of Hispanics (97 searches or 6.1% of all searches). *Id.*

⁹⁵ *Id.* at 1-3.

⁹⁶ *Id.* In New Jersey, two troopers have been indicted for deliberately falsifying records concerning the race of the drivers who were stopped and searched. They are alleged to have recorded "white" on the form where the driver was black. *E.g.*, Mark Hosenball, "It is Not the Act of a Few Bad Apples," *NEWSWEEK*, May 17, 1999, at 34.

⁹⁷ John Knowles, et al., *supra* note 94, at 1-3.

that would suggest that this differentiation would ultimately reduce the disproportionate drug violations by African-Americans as a class.⁹⁸ The same must be true for an official policy that targets African-Americans for a highly disproportionate rate of stops and searches based solely on their race and the alleged criminal propensities of very small numbers of African-Americans.⁹⁹

Moreover, given the fact that, on a relative scale, so few persons among the millions of drivers who use these transportation facilities each day are engaged in illegal drug activity—black or white—and so few stops or searches result in seizures of contraband, it is hard to justify the stops of large numbers of innocent blacks to enable the police to make the occasional seizure.

As Ira Glasser has stated:

Even if most of the drug dealers in the Northeast corridor or in any particular neighborhood or city are black or Latino, it does not follow that most blacks and Latinos are drug dealers Think about it for a minute. Most players in the NBA are black. But if you were trying to get a team together, you wouldn't go out in the street and round up random African Americans.

. . . .

It's a very simple, logical fallacy. The fact that most drug dealers are X does not mean that most X are drug dealers.¹⁰⁰

⁹⁸ See *infra* text accompanying notes 147-149.

⁹⁹ See *infra* text accompanying note 150. It is noteworthy that the Racial Bias study confirmed that similar results could be achieved without the kind of racial profiling that was practiced in Maryland. John Knowles, et al., *supra* note 94, at 23-26.

¹⁰⁰ Ira Glasser, ACLU Biennial Speech (June, 1999), available at <http://www.aclu.org/issues/racial/bispeech99.html> (on file with author). In *Craig v. Boren*, 429 U.S. 190 (1976), the Court found unconstitutional, under intermediate equal protection review, a gender classification that prohibited sale of 3.2% alcohol to men under 21 and to women under 18. The state attempted to justify the discrimination by studies that showed that of 18-20 year olds who were arrested for drunk driving, .18% of females and 2% of males in that age group had been arrested. *Id.* at 201. The Court did not deny the disparity in the statistics, but found that, "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'" *Id.* at 201-02. See also, *id.* at 213-14 (Stevens, J., concurring) ("[I]t does not seem to me that an insult to all of the young men of the state can be justified by visiting the sins of the 2% on the 98%.").

For an incisive discussion of police stereotyping, police discretion, and order maintenance, see M. GOTTFREDSON & D. GOTTFREDSON, *DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* (2d ed. 1988); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 80-81 (MacMillan 3d ed. 1994) (1966); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990* (1993); Roberts, *supra* note 64, at 811 (discussing the potential for reinforcing racist norms in order-maintenance policing); Thompson, *supra* note 25, at 986-87 (discussing the role of stereotyping in police investigations); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990) (discussing police rulemaking and judicial interpretations of police discretion). The role of subconscious racism has also been explored. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing unconscious racism and a new test for establishing race-based behavior); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L.

Of course, while playing the numbers may be good strategy at the card tables at Atlantic City, several miles away on the New Jersey Turnpike the consequences of such a numbers game can be corrosive of legal and moral norms. As David A. Harris has stated:

Behind the race-neutral reasons police give lies a stark truth. When officers stop disproportionate members of African-Americans because this is "just good police work," they are using race as a proxy for the criminality or "general criminal propensity" of an entire racial group. Simply put, police are targeting *all* African-Americans because *some* are criminals. In essence, this thinking predicts that all blacks, as a group, share a general propensity to commit crimes. Therefore, having black skin becomes enough—perhaps along with a minimal number of other factors, perhaps alone—for law enforcement to stop and detain someone.¹⁰¹

No one denies that the crime rates of young urban minorities are higher than those of elderly whites. But to jump from this obvious fact, to the use of race as a general proxy for crime, ignores the equally significant fact that very few minorities commit crimes (and thus an entire class is stigmatized and subjected to harsher treatment for the acts of a few). Further, such a racial proxy fails to consider the enormous damage (even to law enforcement interests) that is done by the resentment and anger that is stirred by this type of policing. Quality of life policing carries with it the strong potential for undermining the legitimacy of police operations, and when race becomes a factor in the exercise of police discretion, the potential is very likely to become manifest.

Finally, racial profiling must be considered in the context of this country's escalating incarceration rates. The statistics regarding race and incarceration rates are stark and deeply troubling. African-American men constitute approximately 7% of the population.¹⁰² In 1930, they constituted 22% of all prison admissions; today they comprise 51% of admissions, a rate six times that of white men.¹⁰³ Nearly one in three black males aged 20-29 is under some form of criminal justice supervision on any given day.¹⁰⁴ A black male born in 1991 has a 29% chance of spending some time in prison during his lifetime.¹⁰⁵

REV. 1016 (1988) (discussing how the Supreme Court has ignored unconscious racism in its decisions).

¹⁰¹ Harris, *Driving While Black*, *supra* note 25, at 572. For discussion of the legality of these practices, see discussion *infra* Part III. Randall Kennedy has likened racial profiling to "a type of racial tax for the war against drugs that whites and other groups escape." KENNEDY, *supra* note 76, at 159. During the Jim Crow era, courts expressly permitted juries to consider race as evidence of criminal intent. *Id.* at 89-90; see *McQuirter v. State*, 63 So. 2d 388, 390 (Ala. Ct. App. 1953) (stating that a jury in determining whether black man intended to rape a white woman, "may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man").

¹⁰² NATIONAL CRIM. JUST. COMM'N, *THE REAL WAR ON CRIME*, 102 (Steven R. Donziger ed., 1996).

¹⁰³ *Id.* at 102-03.

¹⁰⁴ MARC MAUER, *RACE TO INCARCERATE*, 124-25 (1999).

¹⁰⁵ *Id.* at 125.

The figure for whites is 4% and for Hispanics, 16%.¹⁰⁶

A major contributing factor in the escalating disparities in imprisonment is the War on Drugs.¹⁰⁷ Although African-Americans use and possess drugs in close approximation to their numbers in the overall population, they account for 37% of those arrested, 55% of those convicted and 74% of those incarcerated for drug offenses.¹⁰⁸ From 1985 to 1995, there was over a 100% increase in the number of drug offenders in state prison (38,900 to 224,900).¹⁰⁹ One in four inmates, as opposed to the 1980 rate of one in sixteen is a drug offender.¹¹⁰ In the federal system, 59% of inmates are incarcerated on drug charges.¹¹¹ Overall, in 1995, of 1,700,000 inmates in state and federal prisons, 400,000 were held on drug charges.¹¹²

Differentials in sentencing schemes and police practices contribute to the racial disparities. Mandatory federal sentencing statutes punish crack cocaine offense much more harshly than powder cocaine: 500 grams of powder cocaine will result in a five year mandatory sentence while only 5 grams of crack cocaine will trigger the same sentence.¹¹³ Between 1989 to 1990, close to 90% of persons charged with crack cocaine offenses were African-American, but fewer than 35% of those was charged with federal powder cocaine offenses were African-Americans.¹¹⁴

¹⁰⁶ *Id.* While there is a disproportionate number of African-Americans in jail, much of this disproportionality can be explained by racial differences at arrest. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 750-54 (1993) (noting that 76% of the disproportionality can be explained by racial differences at arrest).

¹⁰⁷ *E.g.*, HUMAN RIGHTS WATCH, *supra* note 78, at 13; Blumstein, *supra* note 106, at 756-59 (discussing the racial implications of the war on drugs).

¹⁰⁸ ACLU REPORT, *supra* note 7, at 11.

¹⁰⁹ MAUER, *supra* note 104, at 35.

¹¹⁰ HUMAN RIGHTS WATCH, *supra* note 78, at 13-16.

¹¹¹ *Id.* at 14.

¹¹² ACLU REPORT, *supra* note 7, at 10. In 1996, of all admissions to state prisons for drug offenses, blacks constituted 62.6%, while whites constituted 36.7%. HUMAN RIGHTS WATCH, *supra* note 78, at 17.

¹¹³ 21 U.S.C. § 841 (1994).

¹¹⁴ NATIONAL CRIM. JUST. COMM'N, *supra* note 102, at 118-119. The argument that these statistics simply reflect prosecutions of high level crack dealers runs counter to data from the United States Sentencing Commission. In 1992, of all crack offenders, only 5.5% were classified as high level dealers. 63.7% were listed as street-level dealers or couriers and 30.8% as mid-level dealers. MARC MAUER, *supra* note 104, at 156. For commentary on the crack/powder cocaine dispute, see COLE, *supra* note 25, at 8, 141-44 (discussing the racially disparate effects of federal sentencing for crack cocaine); Days III, *supra* note 82, at 189-93 (discussing the Federal Sentencing Guidelines for cocaine and crack); David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (discussing the mandatory federal sentences for trafficking crack cocaine and arguing that such sentences violate the Equal Protection Clause because the brunt of the sentences fall on African-Americans). To date, every court of appeals to consider the issue has determined that there is no equal protection violation presented by the application of these statutes. *See, e.g.*, *United States v. Then*, 56 F.3d 464, 466 (2d Cir. 1995) (noting that the Second Circuit had joined six other circuits in holding that the Federal Sentencing Guidelines' 100 to 1 ratio of powder cocaine to crack cocaine in determining jail time has a rational basis and does not violate equal protection principles); *United States v. Williamson*, 53 F.3d 1500, 1530 (10th Cir. 1995) (rejecting claim that the section of the Federal Sentencing Guidelines

Race discrimination has also been documented in the critical decisions made by prosecutors and courts to transfer accused offenders from juvenile to adult court for trial. In a recent study in California, it was determined that minority juveniles were more than twice as likely to be transferred to adult court for case disposition than their white counterparts.¹¹⁵ In Los Angeles, in 1996, of the 561 juvenile felony cases transferred to adult court, 5% were white, 6% were Asian, 30% were black and 59% were Hispanic.¹¹⁶ The seriousness of the charges and criminal histories did not explain these disparities.¹¹⁷ Further, once they entered the adult system, young African-Americans were 18.4, and Hispanics were 7.3 times more likely to be incarcerated than white offenders.¹¹⁸ Finally, there is growing evidence of racially disproportionate disenfranchisement of African-Americans under state laws that suspend or forfeit the right to vote for persons convicted of crime.¹¹⁹

There can be no doubting the fact that in policing—as in many areas of contemporary American life—race matters, and matters a

that deal with powder cocaine and crack cocaine violates the constitutional guarantee of equal protection, noting that a disparate racial impact does not necessarily imply intentional discrimination); *United States v. Singleton*, 29 F.3d 733, 741 (1st Cir. 1994) (holding that there is insufficient evidence to find that the sections of the Federal Sentencing Guidelines that deal with powder and crack cocaine violate the Equal Protection Clause of the Fourteenth Amendment); Days III, *supra* note 82, at 189 (noting that each of the twelve circuit courts to examine the issue found that the Sentencing Guidelines that deal with crack cocaine and powder cocaine do not violate the Equal Protection Clause).

¹¹⁵ Tamar Lewin, *Discrepancy By Race Found In the Trying Of Youths*, N.Y. TIMES, Feb. 3, 2000, at A21 [hereinafter Lewin, *Discrepancy*]. See also George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998) (noting the “pronounced differences in [police] officers’ attributions about the causes of crime by white versus black youths”); Tamar Lewin, *Study Finds Racial Bias in Public Schools*, N.Y. TIMES, Mar. 1, 2000, at A14 (discussing report of Applied Research Center of Oakland which found that blacks are 3-5 times more likely to be expelled from high school than whites for similar offenses).

¹¹⁶ Lewin, *Discrepancy*, *supra* note 115, at A21.

¹¹⁷ *Id.*

¹¹⁸ *Id.* This is not to suggest that the mere disparity in numbers is conclusive on the question of racial bias. For example, differential enforcement patterns can contribute to the disparities. Inner city drug dealing is more likely to occur on the street with the attendant hazards and crime associated with open market drug dealing, while drugs in the suburbs tend to be distributed and used behind closed doors. The inner city drug operations tend to be minority-run; suburban to be white. It is far easier to police the street markets and, because of the secondary criminal and quality of life impact street sales create, there is more demand for police intervention in these areas. William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795 (1998); KENNEDY, *supra* note 75, at 378n.*. Further, it has been argued that differences in usage and trafficking patterns explain the disparate racial arrest statistics. Days III, *supra* note 82, at 187-88.

Policing policies in minority communities have generated sharp disagreements. Compare KENNEDY, *supra* note 76, at 138-63 (discussing policing policies in minority neighborhoods), with Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (critically reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998)).

¹¹⁹ George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999).

lot.¹²⁰ The substantial racial disparities that have been documented in stop, frisk, and search practices cannot be fully explained or rationalized by crime patterns, police deployment, or policing tactics. Further, arguments of efficiency and rational discrimination flounder on empirical, constitutional, and moral principles. Yet, in the face of the growing evidence of arbitrary stops, frisks and searches, the courts have in many instances failed to order relief that is commensurate with the extraordinary deviation from legal norms. To understand this state of affairs, I turn to an examination of the legal standards that govern these police practices.

III. THE LEGAL FRAMEWORK: RACIAL PROFILING AND STOPS AND SEARCHES WITHOUT CAUSE

Law enforcement's interest in maximizing the number of contacts, stops and searches of cars and pedestrians has prevailed over constitutionally-based claims of racial equality, privacy, and individual integrity. The Supreme Court has been highly deferential to order-maintenance policing and has imposed substantial limitations on the federal court's powers to remedy constitutional violations. In this Part, I discuss the governing federal substantive standards for car and pedestrian stops and the application of this doctrine to racial profiling and random stop practices. In the next part, I address the remedial issues.¹²¹

A. Automobile Stops

The constitutional story with respect to Fourth Amendment principles has been told—and told well—by others,¹²² so I will trace only the most significant legal developments as they relate to traffic stops and racial profiling. The Supreme Court has permitted stops of cars based on cause to believe that a crime has been committed, including any traffic violation.¹²³ Further, once a car has been permissibly stopped, the driver and passengers can be ordered to stand outside of the vehicle (for the officer's protection), without any objective showing of harm or danger.¹²⁴ At any time during the encounter, and even

¹²⁰ See CORNEL WEST, *RACE MATTERS* (1993) (discussing the continuing issues of race and racism in the United States).

¹²¹ State law may provide broader remedies than those available under federal law. David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 368 (2001).

¹²² E.g., WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (3d ed. 1996); Maclin, *Race*, *supra* note 25 (discussing the competing concerns involved in Fourth Amendment analysis and application); Sklansky, *supra* note 25. For a recent comprehensive historical analysis of the Fourth Amendment, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

¹²³ *Whren v. United States*, 517 U.S. 806, 816-19 (1996).

¹²⁴ *Maryland v. Wilson*, 519 U.S. 408, 410 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111

after a ticket or warning may have been issued, the police can secure consent to search the persons or the car without any statement that no consent need be given, or that they are free to leave.¹²⁵ Any contraband that is observed in "plain view," including detection by use of a flashlight, can be immediately seized and used as probable cause to arrest.¹²⁶ During the stop, any person who appears to present a danger to the officer (and the car itself), may be frisked for the officer's protection.¹²⁷ If cause is established to arrest any of the occupants, a full-scale search of the car including suitcases and other private containers, and of all other passengers is permissible.¹²⁸

The police may question the driver or occupants of the car without providing *Miranda* warnings,¹²⁹ even if they are seeking information about drugs.¹³⁰ Of course, this questioning is often a prelude to a request to search ("I understand that you say you do not have drugs; do you mind if we search?"), without any warning to the driver of his right to refuse consent. Further the police may use a trained dog to detect narcotics without *any* suspicion, cause, or consent.¹³¹

Since virtually every driver commits violations of the traffic laws on a regular basis,¹³² the police have enormous discretion to effectuate stops of a very high number of cars, thus presenting the critical issue of pretextual stops and searches. For some time the lower federal courts divided on this Fourth Amendment question: in circumstances where a traffic violation has occurred, thereby creating probable cause for a stop, should a court consider the officer's subjective intentions or motivations in effectuating the stop, including possible

(1977)

¹²⁵ *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that a lawfully seized defendant need not be advised that he is "free to go" before his consent to search will be recognized as voluntary).

¹²⁶ *Horton v. California*, 496 U.S. 128, 133-37 (1990) (reviewing the "plain view" doctrine); *United States v. Lee*, 274 U.S. 559, 563 (1927) (asserting that use of a searchlight to discover contraband does not violate the Fourth Amendment).

¹²⁷ *Michigan v. Long*, 463 U.S. 1032, 1035 (1983) (holding that a protective search of the passenger compartment of a motor vehicle during lawful investigatory stop of an occupant of the vehicle was reasonable).

¹²⁸ *Wyoming v. Houghton*, 526 U.S. 295, 302-07 (1999) (holding that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search); *California v. Acevedo*, 500 U.S. 565, 574 (1991) (holding that police may search container located within automobile without a search warrant); *New York v. Belton*, 453 U.S. 454, 460 (1981) (upholding the search of the passenger compartment of a vehicle and examination of the contents of any container found within the passenger compartment when the search is contemporaneous to a lawful arrest of an occupant).

¹²⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³⁰ *Berkemer v. McCarty*, 468 U.S. 420, 440-41 (1984) (holding that roadside questioning is not custodial and therefore *Miranda* warnings are not required).

¹³¹ *United States v. Place*, 462 U.S. 696, 698 (1983) (holding that a dog sniff of luggage located in a public place is not a search under the Fourth Amendment). In *City of Independence v. Edmond*, 121 S. Ct. 447 (2000), the Supreme Court found unconstitutional the practice of using roadblocks to stop cars to allow for dog drug sniffs of the car.

¹³² *Harris, Driving While Black*, *supra* note 25 at 545.

racial profiling of the driver?¹³³

The Supreme Court decided this issue in *Whren v. United States*.¹³⁴ There, Washington, D.C. police officers had made a traffic stop and observed two bags of crack cocaine in the hands of a front-seat passenger.¹³⁵ The police testified that the stop was made because the driver had violated several traffic laws, including pausing at a stop sign for an "unusually long time," turning without signaling, and then proceeding at an "unreasonable speed."¹³⁶ The defendants claimed that the stop was pretextual: that the police were suspicious because they observed two black men in a Nissan Pathfinder in Southeast Washington and, lacking any cause for a stop to investigate drugs, decided to stop on the basis of alleged traffic violations to place them in the position where they could conduct a drug investigation.¹³⁷ In fact, the officers involved, on a vice-detail, were prohibited by departmental regulation from making routine traffic stops.¹³⁸

The Supreme Court ruled that from a Fourth Amendment perspective the "constitutional reasonableness of traffic stops" does not depend "on the actual motivations of the individual officers."¹³⁹ According to the Court, the only relevant question was whether, looking at the circumstances from an objective viewpoint, the officer had legal cause for the stop.¹⁴⁰ The Court rejected the claim that the Fourth Amendment requires consideration of whether "the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."¹⁴¹

¹³³ See Sklansky, *supra* note 25, at 285-91 (discussing Justice Scalia's opinion in *Whren* and noting the split decisions in the lower and state courts regarding the subjective intent of the officer making the stop). Specifically, the lower courts had divided over whether a stop was justified where an officer *could* have made a proper traffic stop, see for example, *United States v. Botero-Ospina*, 71 F.3d 783, 786-88 (10th Cir. 1995) (rejecting the "would have" standard), or only where a reasonable officer *would* have done so, see for example, *United States v. Cannon*, 29 F.3d 472, 474-76 (9th Cir. 1994) (en banc) (accepting the "would have" standard after discussing the circuit split).

¹³⁴ 517 U.S. 806 (1996).

¹³⁵ *Id.* at 808-09.

¹³⁶ *Id.* at 808.

¹³⁷ *Id.* at 808-09.

¹³⁸ *Id.* at 815.

¹³⁹ *Id.* at 813.

¹⁴⁰ *Id.* at 813-14.

¹⁴¹ *Id.* at 814. Justice Kennedy dissented from the Court's later decision in *Maryland v. Wilson* to permit police to order all occupants out of a stopped car, without suspicion:

The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way. As the standards suggested in dissent are adequate to protect the safety of the police, we ought not to suffer so great a loss.

Maryland v. Wilson, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting).

In response to the claim that pretextual stops could be racially motivated, the Court stated that the Equal Protection Clause of the Fourteenth Amendment would prohibit any intentional race discrimination in a car stop.¹⁴² However, this perfunctory statement did not address the means by which an intentional race discrimination claim could be proven or what remedies might be available to either a criminal defendant or civil litigant.¹⁴³

Courts and commentators have correctly made the point that pretextual stops, and particularly those based on racial considerations, are inconsistent with the "reasonableness" requirements of the Fourth Amendment.¹⁴⁴ Assuming, however, that the Supreme Court continues to insist that subjective motivations, including racially motivated conduct, are not pertinent to the Fourth Amendment in-

¹⁴² *Whren*, 517 U.S. at 813.

¹⁴³ As Professor Paul Butler has noted, Justice Scalia authored both *Whren* and the dissent in *Morrison v. Olson*, 487 U.S. 654, 728 (1988), in which Justice Scalia quoted Justice Robert Jackson on the dangers of selective prosecution:

If the prosecutor is obligated to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group.

Paul Butler, *Starr is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 709-10 (1999) (citing *Olson*, 487 U.S. at 728).

¹⁴⁴ See, e.g., *State v. Ladson*, 979 P.2d 833 (Wash. 1999) (rejecting the use of pretextual traffic stops, holding that the provision of the state constitution prohibiting the invasion of private affairs or the home without authority of law forbids use of pretext as a justification for a warrantless search); Thompson, *supra* note 25, at 983-999 (pointing to the history behind the Fourth Amendment and social scientific research regarding racial stereotyping to show the conflict between racial profiling and the reasonableness standard of Fourth Amendment jurisprudence); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1285-86 (1998) [hereinafter Maclin, *Terry v. Ohio*] (arguing that the *Terry* decision was flawed because it opened the door for the consideration of race as an element in the reasonableness of a search under the Fourth Amendment); Maclin, *Race, supra* note 25, at 362 (suggesting that pretextual traffic stops based on race don't meet the Fourth Amendment "reasonableness" standard); Harris, *Driving While Black, supra* note 25 at 549-550 (chastising the *Whren* Court for ignoring the fact that racially motivated pretextual stops could be unreasonable); Sklansky, *supra* note 25, at 327 (stating that "there is nothing new in the suggestion that equality is the proper concern of more than one provision of the Constitution"). See also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994) ("[I]n a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable."); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642 (1998) (arguing that the qualitative basis for establishing probable cause is incomplete and requires both procedural and substantive safeguards); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998) (discussing the problems of shifting racial profiling analysis from Fourth Amendment jurisprudence to jurisprudence based on the Equal Protection Clause of the Fourteenth Amendment).

quiry,¹⁴⁵ federal challenges to racial profiling must be mounted on grounds of racial discrimination under the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964. Challenges could also be made under state law in jurisdictions that do not follow *Whren* or that provide an exclusionary remedy in criminal prosecutions for racially discriminatory stops or searches.¹⁴⁶

¹⁴⁵ There are decided similarities between profile stops and the notorious "writs of assistance," the general warrants employed by British soldiers to enter colonial residences to search for violations of customs and duties provisions. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); Morgan Cloud, *Searching Through History, Searching for History*, 63 U. CHI. L. REV. 1707, 1737-39 (1996) (reviewing William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation available from UMI Dissertation Services, 300 N. Zeeb Road, Ann Arbor, Michigan 48106)); see also David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 242-45 (1994) (comparing the use of the writs of assistance by the British during the colonial period to the present methods used in fighting the War on Drugs); Sklansky, *supra* note 25, at 286 (discussing the writs of assistance and comparing them to pretextual traffic stops). These writs were issued by the Crown without a showing of cause and the colonial reaction to the practice of searches without judicial authorization is widely regarded as a highly significant factor in the adoption of the Fourth Amendment. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 481-88 (1965) (discussing the origins of the Fourth Amendment); see also M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 5-6*, 493-97 (1978). While the writs of assistance marked an invasive and harassing program against the colonists, they were not without a "profile" justification: there was a large conspiracy among the colonists to thwart the collection of duties and evidence of this conduct was regularly found in the searches conducted by British agents. *Id.* at 1-7.

In many respects, racial profiling and random stops are the contemporary equivalents of the writs of assistance. They are based on the same assumptions and proceed on the notion that even without specific reason to believe that any particular person is engaged in illegal activity, the "profile" limits the universe of suspects and will in some cases lead to evidence of criminal conduct. See *Commonwealth v. Rodriguez*, 722 N.E.2d 429, 435 (Mass. 2000) (stating that roadblocks used to search for evidence of drug trafficking was comparable to writs of assistance); *Commonwealth v. Lewis*, 636 A.2d 619, 625 (Pa. 1994) ("The facile reliance on drug courier profiles is reminiscent of . . . the general warrants of the British."). See also Thompson, *supra* note 25, at 992-98 (discussing relationship of the writs of assistance during the colonial period, the purposes of the Fourth Amendment, and race discrimination); Maclin, *Race, supra* note 25, at 334-36 (noting the broad search authority of slave patrols during the colonial period and comparing mild colonial reaction to these patrols with fierce resistance to the writs of assistance).

¹⁴⁶ An argument could be made that a showing of intentional race discrimination under the Fourteenth Amendment should result in the exclusion of evidence derived from that misconduct. E.g., *United States v. Jennings*, No. 91-5942, 1993 WL 5927, at *4 (6th Cir. Jan. 13, 1993) (affirming conviction based on consent search but suggesting that racial bias in stop is grounds for exclusion of evidence). Surely, this type of violation is at least as serious as the violation of Fourth Amendment rights and the need for deterrence would appear to be as strong. Karlan, *supra* note 144, at 2009-11 (arguing that suppression of evidence is one of the only remedies to deter police misconduct); see Andrew D. Leipold, *Objective Tests And Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI-KENT L. REV. 559, 571 (1998) (noting the difficulty that a defendant faces in trying to exclude evidence obtained based on a racially motivated stop).

State courts have suppressed evidence as a result of findings of racial profiling. E.g., *Commonwealth v. Gonsalves*, 711 N.E.2d 108, 115-16 (Mass. 1999) (Ireland, J., concurring) (supporting the suppression of evidence gathered as a result of racial profiling by police); *State v. Donahue*, 742 A.2d 775, 782 (Conn. 1999) (suppressing evidence gathered during investigatory stop, noting that the case raises the "insidious specter of 'profiling'"); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

1. *Intentional Race Discrimination Under the Fourteenth Amendment*

A claim of impermissible racial discrimination under the Equal Protection Clause of the Fourteenth Amendment involves two broad areas of inquiry: whether the practice or policy expressly or intentionally classifies persons on the basis of race and, if so, whether the race based classification withstands strict judicial scrutiny.¹⁴⁷ A practice or policy based on an explicit racial classification is "immediately suspect," triggering detailed examination and may be upheld only when shown to be narrowly tailored to serve a compelling government interest.¹⁴⁸

Intentional race discrimination may be shown by a law that "expressly classifies persons on the basis of race,"¹⁴⁹ or by a practice or policy that treats one differently from members of other racial groups to whom he is similarly situated, if applied in an intentionally discriminatory manner.¹⁵⁰ Thus, in the racial profiling context, established policies or practices authorizing stops based on racial characteristics will enable a plaintiff to proceed under the first theory.¹⁵¹ But, as is usually the case, where there is no direct proof of such a policy or practice, statistical evidence will be necessary to show that the police acted with the intent to discriminate. Disparate impact alone is not sufficient, as the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."¹⁵²

¹⁴⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that racial classifications in affirmative action program must be analyzed under strict scrutiny).

¹⁴⁸ *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993) (finding that North Carolina's redistricting legislation was so irregular that it could only be rationally viewed as an attempt to segregate races for voting purposes).

¹⁴⁹ *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (citing *Adarand*, 515 U.S. at 227-29). See also *Rice v. Cayetano*, 120 S. Ct. 1044 (2000) (striking down a provision of Hawaii Constitution limiting by ancestry the right to vote for trustees of agency that administers programs for descendants of Polynesians who occupied island before 1778, finding that the provision violated the Fifteenth Amendment).

¹⁵⁰ E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁵¹ *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000) (holding that when criminal perpetrator is described as African American, no Fourteenth Amendment violation results from the stopping of all blacks in community because the expressed policy for the stops was racially neutral); *United States v. Avery*, 128 F.3d 974, 985 (6th Cir. 1997) (holding that a violation of the Equal Protection Clause results if law enforcement personnel "adopt[] a policy, employs a practice, or in a given situation takes steps to initiate an investigation . . . based solely upon that citizen's race"); *Alexis v. McDonald's Restaurants*, 67 F.3d 341, 353-54 (1st Cir. 1995) (finding that use of excessive force to effect a forcible removal from the restaurant was motivated by a discriminatory animus).

¹⁵² *Washington v. Davis*, 426 U.S. 229, 240 (1976). See also, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977) (holding that discriminatory intent can be shown by a combination of factors, including impact, historical context, substantive departures from norms, and administrative practices; plaintiff must show race was "a motivating factor," not the "sole" or "primary" reason). *Hunt v. Cromartie*, 526 U.S. 541 (1999) (noting that legislative motivation is a central question in determining claims of racial gerrymandering;

Use of statistical evidence to establish intentional race discrimination in criminal trial settings has met with mixed results. The Supreme Court has sustained attacks on racially discriminatory jury selection procedures and racially-based peremptory challenges upon statistical evidence that demonstrated that race played an impermissible role in these proceedings.¹⁵³ In these cases the Court established a base line for establishing a prima facie case of racial discrimination that could be satisfied by statistical evidence concerning the challenged practices.¹⁵⁴

In *Hunter v. Underwood*,¹⁵⁵ the Court sustained an equal protection claim by African-Americans who claimed that they were disenfranchised for convictions under an Alabama law that was adopted with the intent to discriminate on the basis of race, and which in fact had a racially discriminatory impact on African-Americans.¹⁵⁶ As proof of the impact, the Court noted that blacks were disenfranchised under this law at a rate 1.7 times more often than whites in certain counties, and up to 10 times more often in other areas of the state.¹⁵⁷ The Court did not require proof of the identity of white persons who were not disenfranchised because their convictions were for crimes not

circumstantial and statistical evidence may be used to prove racial motivation). The Supreme Court has also permitted a finding of discriminatory intent where the law or policy promotes racial stereotypes. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (stating that "the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) (cautioning against "automatic invocation of race stereotypes" in determining that peremptory challenges excluding jurors based on race in private civil cases was unconstitutional). In *Rice v. Cayetano*, 120 S. Ct. 1044 (2000), the Court found that ancestral voting restrictions were based on a "demeaning premise that citizens of a particular race are somehow more qualified to vote on certain matters," *id.* at 1060, and were "corruptive of the . . . legal order," *id.* at 1046.

¹⁵³ *Batson v. Kentucky*, 476 U.S. 79, 94-98 (1986). See also *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that criminal defendant may object to race-based exclusion of jurors effected through peremptory challenges whether or not defendant and excluded jurors share same race); *Castaneda v. Partida*, 430 U.S. 482 (1977) (holding that a showing that the population of the county was 79.1% Mexican-American, but that over an 11-year period only 39% of the persons summoned for grand jury service were Mexican-American, established a prima facie case of discrimination against Mexican-Americans in grand jury selection); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (holding that statistics may establish a prima facie case of invidious racial discrimination in the selection of the grand jury).

¹⁵⁴ As an example of how a plaintiff may prove an inference of discrimination, the *Batson* Court noted that a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination, and further stated:

In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse.

476 U.S. at 95 (citations omitted).

¹⁵⁵ 471 U.S. 222 (1985).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 227.

deemed to involve moral turpitude (the disenfranchising trigger).¹⁵⁸

However, in *McCleskey v. Kemp*,¹⁵⁹ the Court rejected, as insufficient under Eighth and Fourteenth Amendment standards, a statistical analysis concerning the application of the death penalty in Georgia.¹⁶⁰ Conducted by David C. Baldus, an expert in the area of statistics and criminal justice issues, the study used in *McCleskey* found that among all of the factors that might influence a jury to impose the death penalty, the race of the victim was the most consistent and central factor.¹⁶¹ Without controlling for other factors, the defendant was eleven times more likely to receive the death penalty if the victim was white than if the victim was black.¹⁶² Baldus's study, which considered 230 variables, including 39 non-racial variables, that could affect sentencing, demonstrated that the odds of a defendant receiving the death penalty where the victim was white was 4.3 times higher than for a black victim, a statistically significant number.¹⁶³

The Court distinguished *McCleskey*'s claim from venire-selection and Title VII cases, where the courts have allowed statistics as proof of discriminatory intent.¹⁶⁴ In the Court's view, "the statistics relate[d] to fewer entities, and fewer variables [were] relevant to the challenged decisions."¹⁶⁵ *Batson* was different from *McCleskey*'s situation because, "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts."¹⁶⁶

The Court stated that the Baldus study showed only a "correlation" between the race of the victim and the death penalty decision.¹⁶⁷ It is evident, however, that the study established far more than a "correlation" between race and sentence; it demonstrated a strong causative relationship. The Court was simply unwilling to recognize the degree to which race influenced jurors in capital cases, where such a finding would call into question a large number of death penalties.

¹⁵⁸ *Id.* at 232-33.

¹⁵⁹ 481 U.S. 279 (1987).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 286-87.

¹⁶² *See id.* at 286.

¹⁶³ *Id.* at 287.

¹⁶⁴ *Id.* at 294-95.

¹⁶⁵ *Id.* at 295.

¹⁶⁶ *Id.* at 296, n.17. The Court further distinguished the venire selection and Title VII cases on the ground that:

The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker. The Baldus study seeks to deduce a state "policy" by studying the combined effects of the decisions of hundreds of juries that are unique in their composition. It is incomparably more difficult to deduce a consistent policy by studying the decisions of these many unique entities.

Id. at 295, n.15.

¹⁶⁷ *Id.* at 312.

The Court also questioned how far the logic of the argument would carry: the claim, Justice Powell stated, "throws into serious question the principles that underlie our entire criminal justice system."¹⁶⁸ Unexplained by the Court was the acceptance of such discrimination in the most serious decision made in the criminal courts, notwithstanding the Court's insistence that it had engaged in "unceasing efforts to eradicate racial prejudice from our criminal justice system."¹⁶⁹ Justice Brennan commented that the Court's concern with the implications of the statistics for other aspects of the criminal justice system displayed "a fear of too much justice."¹⁷⁰

The Court took a similar hands-off approach in *United States v. Armstrong*,¹⁷¹ where it reversed a ruling that would have permitted discovery in support of a motion to dismiss federal crack cocaine prosecutions against black defendants on grounds of racially selective prosecution.¹⁷² The defendants sought to prove discriminatory intent by showing a racially disparate pattern of federal crack cocaine prosecutions.¹⁷³ In a preliminary submission, the defendant showed that every one of the twenty-four crack cocaine cases closed by the public defender's office in 1991 involved a black defendant.¹⁷⁴

The government responded by setting forth race-neutral criteria such as the quantity of drugs, firearms violations, the evidence, and the criminal histories of the defendants.¹⁷⁵ The government also submitted part of a 1989 Drug Enforcement Administration report stating that "[l]arge scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack."¹⁷⁶ The defendants answered with affidavits asserting that there were an equal number of Caucasian and minority users and dealers and that "many nonblacks are prosecuted in state court for crack offenses."¹⁷⁷

The Court ruled that the defendants were not entitled to discovery because they "failed to satisfy the threshold showing . . . that the Government declined to prosecute similarly situated suspects of other races."¹⁷⁸ In a selective prosecution case, the Equal Protection Clause requires a showing that similarly situated suspects of other races were not prosecuted and "some evidence" of this essential proof must be produced.¹⁷⁹ The Court stated that prosecutors were entitled to a

¹⁶⁸ *Id.* at 314-15.

¹⁶⁹ *Id.* at 309 (citation omitted).

¹⁷⁰ *Id.* at 339 (Brennan, J., dissenting).

¹⁷¹ 517 U.S. 456 (1996).

¹⁷² *Id.* at 458, 470-71.

¹⁷³ *Id.* at 459.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 460.

¹⁷⁶ *Id.* (citation omitted).

¹⁷⁷ *Id.* at 460-61.

¹⁷⁸ *Id.* at 458.

¹⁷⁹ *Id.*

presumption of the proper performance of their duties and relied upon arrest statistics to reject the argument that blacks and whites commit drugs offenses at rates that would not justify the highly disproportionate federal prosecution of black crack cocaine offenders.¹⁸⁰ As discussed above, these arrest data are suspect, but the Court, which had so seriously questioned the data in *McCleskey*, and which has condemned racial stereotyping in other contexts,¹⁸¹ seemed untroubled in using these statistics to dismiss the claim of unfair racial disparities in prosecutions. Thus, despite what appeared to be a reasonable *prima facie* showing, even a limited request for discovery was unavailing.¹⁸²

McCleskey and *Armstrong* are troubling, but are not dispositive of racial profiling claims. In *McCleskey* the Court stressed the unique discretion given to juries to decide between life and death in requiring proof beyond statistical patterns for the system as a whole to show that the judgment in an individual case was infected by intentional discrimination.¹⁸³ It may be that courts will not permit the discriminatory intent to be inferred from the judgment of disparate juries and different prosecutors acting independently from each other, but will find that statistical evidence that law enforcement officers repeatedly target racial minorities is sufficient to establish a Fourteenth

¹⁸⁰ *Id.* at 464-69. The Supreme Court cited statistics compiled by the Sentencing Commission:

The Court of Appeals reached its decision in part because it started "with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." 48 F.3d, at 1516-1517. It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing Comm'n, 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, *ibid.*; and 91% of those convicted for pornography or prostitution were white, *id.* at 41 (Table 13). Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

Id. at 469-70.

The Court's willingness to accept the proposition that rates of drug convictions by race and type of substance reflect actual rates of drug possession or trafficking is inconsistent with empirical data and Supreme Court pronouncements in related contexts. As the Attorneys General of New Jersey and New York have concluded, drug arrest statistics are highly misleading. *See* REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46; INTERIM REPORT OF ATTORNEY GENERAL OF NEW JERSEY, *supra* note 32. Further, as Professor Karlan has noted, in no other area of equal protection jurisprudence has the Court been willing to make this kind of judgment. Karlan, *supra* note 144, at 2024-25. Thus, the Court has rejected as demeaning the notion that black voters "think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). *See also*, *Rice v. Cayetano*, 120 S. Ct. 1044, 1060 (2000) ("Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.").

¹⁸¹ *See supra* text accompanying notes 153-158.

¹⁸² *Armstrong*, 517 U.S. at 470-71. For critical commentary on *Armstrong*, see Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHL-KENT L. REV. 605 (1998).

¹⁸³ *McCleskey v. Kemp*, 481 U.S. 279, 293-94, 308-11 (1987).

Amendment claim. As the Court stated in *McCleskey*:

[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII [employment discrimination] cases . . . Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.¹⁸⁴

Armstrong's requirement that the defendant show that similarly situated white offenders were not subjected to federal prosecution, while questionable, should not bar selective *policing* claims. First, evidence that shows statistically significant disparities in the rates at which similarly situated black and white drivers are stopped and/or searched pursuant to alleged traffic violations establishes the factual predicate of similarly situated white drivers who have not been stopped and searched.¹⁸⁵

Second, *Armstrong* reaffirmed the rulings in *Batson v. Kentucky*¹⁸⁶ and *Yick Wo v. Hopkins*,¹⁸⁷ that statistical proof is sufficient where a challenged practice is characterized by a highly discretionary "selection procedure that is susceptible of abuse,"¹⁸⁸ or where discrimination is sufficiently "clandestine and covert" that evidence other than naming white comparables is the "only available avenue of proof."¹⁸⁹ Several courts have sustained racial profiling equal protection claims based on this order of proof.¹⁹⁰ Where a racial profiling challenge is based on the theory that official policy contains an express racial clas-

¹⁸⁴ *Id.* at 294.

¹⁸⁵ See *Hunter v. Underwood*, 471 U.S. 222 (1985) (relying on statistics in finding that a facially neutral disenfranchisement statute violated the Equal Protection Clause of the Fourteenth Amendment).

¹⁸⁶ 476 U.S. 79 (1986).

¹⁸⁷ 118 U.S. 356 (1886).

¹⁸⁸ *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

¹⁸⁹ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (citations omitted). As the Court stated:

Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id.

¹⁹⁰ See, e.g., *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (allowing equal protection claim based in part on statistical evidence); *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560 (D. Md. 1999) (noting that plaintiffs have standing based on continuing practice of racial profiling by police); *National Cong. for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999) (holding that allegation that police stopped and frisked black and Latino men based on their race and national origin was sufficient to state equal protection claim, notwithstanding that complaint failed to identify similarly situated non-minority individuals who were not stopped and frisked). But see *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053, 1065 (N.D. Ill. 1993) (statistical evidence alone was insufficient to satisfy "similarly situated" requirement applicable to equal protection claim).

sification, there should be no need to plead or prove the existence of a similarly situated non-minority group or person who was not subject to the complained of practices.¹⁹¹ As the Second Circuit recently explained:

[I]t is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, see *Able v. United States*, 155 F.3d 628, 631-32 (2d Cir. 1998), and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue.¹⁹²

Third, *Armstrong* was a selective prosecution case challenging a prosecutor's discretion in deciding to charge particular defendants.¹⁹³ As the Court emphasized, prosecutors are accorded a strong presumption in favor of the "regularity" of their decisions, rebuttable only by "clear evidence to the contrary."¹⁹⁴ Because of separation of powers concerns, courts are "properly hesitant to examine the decision whether to prosecute."¹⁹⁵ There is no such presumption of correctness accorded to police officers charged with racial discrimination or other violations of constitutional norms in law enforcement duties.¹⁹⁶

Equal Protection doctrine does not absolutely prohibit consideration of race in enforcement or implementation of governmental policies and a "compelling governmental interest" can justify the practice.¹⁹⁷ Certainly police can consider race where a physical description is provided, but absent that factor, or other self-limiting factors, race cannot be considered in the decision to stop, detain, or search.¹⁹⁸ Tactical deployment, surveillance operations, and policing

¹⁹¹ *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000); *National Cong. for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999).

¹⁹² *Brown*, 221 F.3d at 337.

¹⁹³ *United States v. Armstrong*, 517 U.S. 456 (1996).

¹⁹⁴ *Id.* at 464.

¹⁹⁵ *Id.* at 465.

¹⁹⁶ See *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (voiding as vague a city ordinance that prohibited "criminal street gang members" from loitering in public places); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (finding loitering statute void, because it "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest"); *Allee v. Medrano*, 416 U.S. 802, 813 (1974) (police prohibited from "using their authority as peace officers to arrest, stop, disperse, or imprison [labor organizers] . . . without 'adequate cause'").

¹⁹⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485 (1989) (citation omitted).

¹⁹⁸ E.g., *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 293 (10th Cir. 1996) (to detain suspect for questioning, "police must be able to articulate something more than an inchoate and unparticularized suspicion or hunch."); *United States v. Ornelas-Ledesma*, 16 F.3d 714, 717 (7th Cir. 1994) ("The 'suspicious' circumstances [relied upon by the police in stopping the defendants would mean] . . . that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking."); *United States v. Anderson*, 923 F.2d 450, 455 (6th Cir. 1991) ("Suspicious based solely on race of person stopped cannot give

methods might well reflect responses to patterns of crime, and result in more intrusive operations in minority communities, but race should not warrant forcible stops or searches.

2. Title VI and Disparate Impact

Under Title VI of the Civil Rights Act of 1964,¹⁹⁹ regulations promulgated by the Department of Justice prohibit governmental action that have a disparate impact by reason of race:

A recipient [of federal funds] . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.²⁰⁰

rise to a reasonable suspicion justifying a *Terry* stop." (citation omitted)). In *United States v. Taylor*, 956 F.2d 572, 581 (6th Cir. 1992) (en banc) the dissent asserted:

The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must 'be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations.'

Id. at 581 (Keith, J., dissenting) (citation omitted).

In *United States v. Weaver*, 966 F.2d 391, 392 (8th Cir. 1992), the court upheld a stop of a black drug courier suspect at the Kansas City Airport based on information that "a number of young roughly dressed black males from street gangs in Los Angeles frequently brought cocaine into the Kansas City area." *Id.* at 392-93. The court ruled that DEA agents can rely upon racial characteristics if objective crime trend analysis validates use of these characteristics as 'risk factors' in predicting criminal activity. *Id.* at 394. In the same view Los Angeles Police Chief Bernard Parks has stated:

We have an issue of violent crime against jewelry salespeople The predominant suspects are Colombians. We don't find Mexican-Americans, or blacks or other immigrants. It's a collection of several hundred Colombians who commit this crime. If you see six in a car in front of the Jewelry Mart, and they're waiting and watching people with briefcases, should we play the percentages and follow them? It's common sense.

Goldberg, *supra* note 62.

United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976), upheld stops of persons at fixed border checkpoints that were based in part on Mexican ancestry. However, in *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc), the court ruled that it is impermissible to take Hispanic origin into account in stops in Southern California. The court noted both significant "demographic changes" and "changes in the law restricting the use of race as a criterion in government decision-making." *Id.* at 1134.

¹⁹⁹ 42 U.S.C. § 2000(d) (1994) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." See also, Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(c) (repealed 1984) (prohibiting discrimination on basis of race, color, national origin, sex, or religion by law enforcement agencies that receive federal funding).

²⁰⁰ 28 C.F.R. § 42.104(b)(2) (1999). The regulations also require that "[e]very application for Federal financial assistance . . . shall, as a condition to its approval and the extension of any Federal financial assistance . . . contain or be accompanied by an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this sub-

Whether private parties may enforce this regulation through an implied right of action similar to that authorized by *Cort v. Ash*,²⁰¹ was recently addressed in *Powell v. Ridge*,²⁰² where the court set forth a three part test for determining whether Title VI regulations were enforceable by private parties: (1) whether a private cause of action exists under the enabling statute; (2) whether the agency rule is properly within the scope of the statute; and (3) whether implying a cause of action will further the purposes of the statute.²⁰³ Title VI does permit private enforcement,²⁰⁴ and the Department of Justice regulation appears to be well within the scope of the enabling statute. In *Guardians Association v. Civil Service Commission*,²⁰⁵ regulations prohibiting discriminatory effects were approved by a majority of the Court.²⁰⁶ And in *Alexander v. Choate*,²⁰⁷ a unanimous Court confirmed that: "Title VI has delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."²⁰⁸

Since *Guardians* and *Choate*, federal courts of appeals have consistently found that Title VI implementing regulations prohibiting practices that cause an unjustified disparate impact provide a basis for private plaintiffs to sue recipients of federal funds on a discriminatory effects theory, without a showing of discriminatory intent.²⁰⁹

Private enforcement of such regulations will further the purposes of the statute. Title VI "sought to accomplish two related, but never-

part." 28 C.F.R. § 42.105(a)(1) (1999).

²⁰¹ 422 U.S. 66, 74-77 (1975) (discussing standards for determining whether a right of action should be implied under a federal statute).

²⁰² 189 F.3d 387 (3d Cir. 1999).

²⁰³ *Id.* at 397-98.

²⁰⁴ *Cannon v. University of Chicago*, 441 U.S. 677, 710-16 (1979); *Cf. Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (upholding private challenge under Title VI of the Civil Rights Act of 1964), *cert. granted sub nom. Alexander v. Sandoval*, 121 S. Ct. 28 (2000) (accepting petition of certiorari challenging Title VI ruling).

²⁰⁵ 463 U.S. 582 (1983).

²⁰⁶ *See* 463 U.S. at 584 n.2 (White, J.); *id.* at 623 n.15 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, Brennan, Blackmun, JJ., dissenting).

²⁰⁷ 469 U.S. 287 (1985).

²⁰⁸ *Id.* at 293-94.

²⁰⁹ *See, e.g., Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999) (holding that regulations promulgated under Title VI prohibiting discriminatory effects in educational programs gave rise to an implied private right of action); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997) (holding that a private right of action exists under Title VI regulations), *cert. granted* 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) (finding that while Hispanic parents had a private cause of action under Title VI to challenge decision of school district to close neighborhood elementary schools and a open new charter school, because parents failed to show a disparate impact, their claims were denied); *New York Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036-37 (2d Cir. 1995) (noting that riders of the New York City Transit Authority subway and bus system, the majority of whom are members of protected minority groups, had a private cause of action under Title VI).

theless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.²¹⁰ In enacting the regulations, the Department of Justice determined that "disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."²¹¹

A plaintiff seeking to enforce the regulations must also establish standing given the particular state program and plaintiff's relationship to that program. Most state and local police agencies receive federal funds and the Civil Rights Restoration Act of 1987 defines "program or activity" to include all the operations of a governmental department or agency which receives federal funds.²¹² Using this definition of "activity or program," traffic stops, searches, and arrests should be covered.

Whether a plaintiff has to demonstrate that she was a direct participant in or intended beneficiary of a covered "program or activity" in order to assert a claim under Title VI is not clear, but even if that were so, Title VI should still apply to traffic and pedestrian stops. The statute, as well as its implementing regulation, provides that "[n]o person . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."²¹³ Were standing to be restricted only to direct beneficiaries or participants, claims asserted by persons "subjected to" discrimination by a federally funded entity who did not fall into either category would fail. The language of Title VI, however, prohibits *any* discriminatory conduct against an individual member of a protected class by a covered entity, including actions of a police officer. "[T]he plain meaning of 'activity' is a 'natural or normal function or operation' It is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context."²¹⁴

²¹⁰ *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

²¹¹ *Choate*, 469 U.S. at 293-94. There is substantial evidence of congressional intent to permit private plaintiffs to enforce the discriminatory effects standard set forth in Title VI regulations. Since *Guardians* and *Choate* were decided, Congress has amended Title VI to broaden the scope of the statute's coverage while acknowledging the existence of a privately enforceable discriminatory effects standard. Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a(1) (1994).

²¹² 42 U.S.C. § 2000(d)-4a (1994). See *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999) (finding that the Civil Rights Restoration Act of 1987 applies only to specific programs receiving federal aid).

²¹³ 42 U.S.C. § 2000(d) (emphasis added).

²¹⁴ *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997) (citations omitted). See also *Bryant v. New Jersey Dep't of Transp.*, 998 F. Supp. 438 (D.N.J. 1998) (holding that African-American residents whose homes may be destroyed as a result of a federally funded highway project allegedly allocated in a discriminatory manner had standing under Title VI).

Finally, racial profiling plaintiffs come within the scope of prudential standing limits. The Supreme Court has recently reaffirmed the "zone of interests" test as a prudential limitation on standing in the context of an action brought under the Administrative Procedure Act. As the Court has articulated that test:

The proper inquiry is simply "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected . . . by the statute." Hence, in applying the "zone of interests" test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests "arguably . . . to be protected" by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them.²¹⁵

Disparate impact theory avoids the difficult burden of proof of intentional discrimination.²¹⁶ Statistical evidence of the type assembled in New Jersey, Maryland, and Illinois would be sufficient to put the burden of justification for the use of racial characteristics on the law enforcement agency and would require substantial evidence as to the necessity and efficacy of racial profiling in the highway drug courier context.²¹⁷

B. Pedestrian Stops

The surge of attention to racial profiling on the highways has led to concern as well over similar police practices in stops of pedestrians and other travelers. Pedestrian stops, frisks and searches present some comparable legal issues. Thus, while the Fourteenth Amendment and Title VI standards discussed above will govern pedestrian stops as well, the policing interests and Fourth Amendment standards differ in significant respects from car stops and searches.

²¹⁵ *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (citations omitted). See also, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693 (2000) (holding that environmental plaintiffs adequately alleged injury in fact, for standing purposes, when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity).

²¹⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that intentional discrimination need not be shown under a Title VI claim).

²¹⁷ See *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1140-42 (N.D. Cal. 2000) (finding that statistical evidence could be used by plaintiffs in a racial profiling case to support claim based on an equal protection violation). Of course, the United States may invoke Title VI regulations directly to terminate federal funding of police departments that engage in practices that result in unjustified disparate impact on racial minorities. As I discuss below, in the past year the Department of Justice, pursuant to powers provided by Congress in 1994 to sue to enjoin unconstitutional patterns and practices by law enforcement agencies, has obtained consent decrees in New Jersey and Montgomery County, Maryland, that prohibit racial profiling on highways.

1. Police Practices and Interests

Pedestrian stops are at the very core of policing. They are used to enforce narcotics and weapons laws, to identify fugitives or other persons for whom warrants may be outstanding, to investigate reported crimes and "suspicious" behavior, and to improve community "quality of life." They are also designed to secure intelligence information about criminal activities and to establish a police presence in, and physical control of, certain communities. The type of patrol sends a very strong message to the community, and stop and frisk practices are a key element of order-maintenance policing. As the New York Attorney General has reported:

Order maintenance theory encourages officers to intervene in instances of low-level disorder, whether observed or suspected, with approaches which fall short of arrest. A "stop" intervention provides an occasion for the police to have contact with persons presumably involved in low-level criminality—without having to effect a formal arrest, and under a lower constitutional standard (i.e., "reasonable suspicion"). Indeed, because low-level "quality of life" and misdemeanor offenses are more likely to be committed in the open, as a theoretical matter, the "reasonable suspicion" standard may be more readily satisfied as to those sorts of crimes. To the extent that "stop" encounters create points of contact between police and low-level offenders, such contacts can lead to the apprehension of persons already wanted for more serious crimes, or who might be prepared to commit them in the near future.²¹⁸

The pedestrian stop can be triggered by any number of diverse factors, although as a legal matter the police cannot forcibly stop or detain persons without reasonable suspicion to believe that criminal conduct may be afoot.²¹⁹ The complex and protean nature of street investigations, from both racial and crime control perspectives, makes legal and political judgments in this field highly controversial. The Supreme Court has addressed these issues in numerous cases over the years and has developed a methodology for balancing law enforcement and privacy interests.²²⁰ This article is not the occasion to analyze or critique this very large body of case law (which is the subject of extensive commentary);²²¹ rather, the focus will be on the relevance to

²¹⁸ REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 57.

²¹⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

²²⁰ The standards under the Fourth Amendment are far easier to state than to apply in specific factual contexts. In summary, consensual encounters between the police and civilians (defined as situations where a reasonable person would feel free to decline to answer questions or to leave the area) can be made without any showing of cause or suspicion, investigative stops (forced stops where an individual is not free to leave) may be effectuated upon "reasonable suspicion" of criminal conduct, a frisk (protective pat down for the officer's protection, but not as a search for contraband) is permissible incident to an investigative detention where the officer has articulable grounds for such action, and an arrest and full scale search are justified only upon a showing of probable cause. See generally, WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (3d ed. 1996).

²²¹ E.g., *Terry v. Ohio 30 Years Later: A Symposium on the Fourth Amendment, Law Enforcement*

Fourth Amendment doctrine of the empirical data that has been collected with respect to pedestrian stop practices.

Law enforcement officials maintain that there is a direct relationship between the degree of discretion they may exercise in stops, frisks, and questioning of individuals, and the effectiveness of their crime fighting and intelligence efforts.²²² Of course, the greater the police power, the greater is the potential for abuse. And it is precisely at this intersection of crime, race and, police stop and frisk practices that the underlying social and legal conflicts most often are manifested, and not infrequently in sharp and violent confrontations. On February 4, 1999, in New York City, one of these incidents exploded in controversy and generated a searching inquiry into the nature of these police street practices, with particular emphasis on their impact on people of color. On that date four plain-clothed officers from the elite Street Crimes Unit, observed Amadou Diallo in the vestibule of his apartment building and decided to investigate his nighttime appearance at that location.²²³ As they approached, Diallo remained in the vestibule with a wallet in one hand and the police, claiming that they thought the wallet was a gun and that Diallo had been acting "suspiciously," started shooting; forty-one bullets were fired and nineteen penetrated Diallo's body.²²⁴ The death of Diallo, an immigrant street peddler with no criminal record and carrying no weapons, brought to a head the long simmering controversy over aggressive New York policing practices and led to widespread demonstrations and protests of racially-biased policing.²²⁵

In the public debate, comparisons were inevitably drawn between the Diallo killing and the sadistic torture by New York police officers of Abner Louima some nineteen months earlier.²²⁶ But whatever similarities exist between the two incidents on reference points of race and police aggressiveness, no one contends that the type of brutality in the Louima affair was anything but criminal. The killing of Diallo, however, has evoked reactions ranging from criminal indictment to a defense that the incident, while tragic, was an aberrant by-

and *Police-Citizen Encounters*, 72 ST. JOHN'S L. REV. 721 (1998).

²²² See *supra* note 76 and accompanying text.

²²³ See *infra* notes 225-227.

²²⁴ *Id.*

²²⁵ See, e.g., Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think Police Are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1; Michael Cooper, *Safir May Use Data on Frisks to Back Unit*, N.Y. TIMES, Apr. 19, 1999, at B1 (reporting that the New York City Police Commissioner was attempting to deflect attacks that stops and frisks were racially biased); Robert D. McFadden, *Four Officers Indicted for Murder in Killing of Diallo, Lawyer Says*, N.Y. TIMES, Mar. 26, 1999, at A1 (noting that the killing had led to a storm of protests against the police). On February 25, 2000 all four officers were acquitted on the criminal charges. Jane Fritsch, *4 Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1. See also, Kevin Flynn, *Shooting Raises Scrutiny of Police Anti-Drug Tactics*, N.Y. TIMES, Mar. 25, 2000, at A1 (reporting criticism of narcotics enforcement in the wake of shooting of Patrick Dorismond, an unarmed man).

²²⁶ E.g., Elizabeth Kolbert, *The Perils of Safety*, THE NEW YORKER, Mar. 22, 1999, at 50.

product of an essential police practice.²²⁷

Brutality, however effective in establishing police hegemony, cannot be defended in a democratic society.²²⁸ By contrast, aggressive street patrol is defended as an essential element of urban policing and the inevitable abuses that occur in the course of this police work are presented as costs to be endured if crime is to be effectively controlled. The contours of this debate were captured well by Elizabeth Kolbert:

If you are a black resident of New York City, your chances of being murdered are at least five times as high as they are if you are white, and the odds that you've been arrested for murder are more than ten times as high. This disparity means that the police will see more behavior by blacks that they will legitimately identify as suspicious. At the same time, it means that they will, almost inevitably, come to see criminal behavior as a black phenomenon, which is not only profoundly unfair but also unlawful. The more aggressive policing becomes—the more the cops try to anticipate crimes before they occur—the more such structural biases are brought out into the open.

Of course, the segregation of crime, by income, by neighborhood, and, especially, by race, is what makes such strategy politically practical in the first place. Crucial constituencies have little directly to lose from it. The cost of aggressive policing may be a collective erosion of civil rights, but only some groups feel the immediate impact.

...

²²⁷ E.g., Joyce Purnick, *Central Issue is Left Unsaid in Diallo Case*, N.Y. TIMES, Feb. 21, 2000, at B1 (suggesting that the aggressive tactics used by the Street Crime Unit of the New York Police Department was a major factor in the death of Diallo); Clyde Haberman, *When Doing Wrong Isn't Wrongdoing*, N.Y. TIMES, Feb. 27, 2000, § 4 (Week in Review), at 3 (reporting the spectrum of public responses in the wake of the jury acquittal of the police officers charged in the killing of Diallo).

²²⁸ Patterns of brutality, even torture, are not mere vestiges of the past. In recent years, evidence of brutal and sadistic conduct by officers and groups of officers in major police departments across the country have demonstrated how insidious are these practices. See, Bandes, *supra* note 67, at 1307-09 (analyzing ways in which the courts and other institutions have avoided confronting institutional patterns of police misconduct by reducing evidence to anecdotes); Todd S. Purdum, *Los Angeles Police Officer Sets Off Corruption Scandal*, N.Y. TIMES, Sept. 18, 1999, at A9 (reporting that a dozen police officers were suspended after an investigation uncovered cases in which the police had shot an unarmed and handcuffed gang member, and then framed him); see also, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMMISSION] (reporting on the excessive use of force in the Los Angeles Police Department in the wake of the Rodney King beating); REPORT OF THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (July 7, 1994) (Milton Mollen, Chair) [hereinafter MOLLEN COMMISSION], reprinted in 6 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894-1994 (Gabriel J. Chin ed., 1997) (investigating police corruption in the New York City police department). Police officials are almost always quick to deny allegations of brutality, and the code of silence and other entrenched practices in the police culture often make it difficult to prove these matters. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000).

[P]eople sense, if only intuitively, the fundamental difference between the [Louima and Diallo] cases. Allegedly, as the cops beat Louima in their squad car on the way to the station and then tortured him inside it, they taunted him with racial epithets. The very explicitness of their racism was something to condemn, but also to take some comfort in: What those cops did to Louima, you could tell yourself, clearly had nothing to do with doing their job. It is much harder to say that about Diallo.²²⁹

The constitutional seeds of this controversy were planted more than 30 years ago when the Supreme Court first decided how the Fourth Amendment would be applied to the street stop and frisk. Decided at a time of urban turmoil, bitter police/minority community relationships, and deep social conflict on a wide range of issues, the Court's opinion in *Terry v. Ohio*²³⁰ established a doctrinal framework that has endured to this day. The Court ruled that a stop is "reasonable" under the Fourth Amendment if the facts and circumstances made known to the officer provide grounds for an objectively reasonable belief that criminal activity may be afoot.²³¹ Further, the Court decided that if the officer had a reasonable belief that the person stopped was "armed and dangerous," a pat-down frisk could be conducted, again on less than probable cause.²³² In some respects, this approach is the street equivalent to the *Whren* pretext doctrine for cars: just as the police use the traffic stop to place themselves in a position to search the vehicle and occupants, they use the stop of pedestrians to gain the opportunity to frisk.

The Court recognized the abuses that attend stop and frisk practices, including possible disproportionate impact on racial minorities,

²²⁹ Kolbert, *supra* note 226, at 50, 56-57; see, Brent Staples, Editorial, *How a Black Man's Wallet Becomes a 'Gun,'* N.Y. TIMES, Mar. 12, 2000, § 4 (Week in Review), at 14 ("The root of the problem is the tendency of white police officers—and white Americans generally—to associate blackness with criminality . . .").

²³⁰ 392 U.S. 1 (1968).

²³¹ *Id.* at 30.

²³² *Id.* at 27. See generally, 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(a), 137-43, 9.5(a), 246-70 (3d ed. 1996). Over the years, the Court has expanded the power to stop and frisk. See, e.g., *United States v. Sokolow*, 490 U.S. 1 (1989) (drug enforcement agents had reasonable suspicion to conduct investigative stop of suspected drug courier who flew from Honolulu and spent 48 hours in Miami, paid for two plane tickets with \$2,100 from roll of \$20 bills containing nearly twice that much; never checked his luggage, and agents had reasonable ground to believe that suspected courier was traveling under an alias); *United States v. Sharpe*, 470 U.S. 675 (1985) (holding that a twenty-minute detention of a criminal suspect is reasonable under the Fourth Amendment); *United States v. Cortez*, 449 U.S. 411 (1981) (holding that stop based on "inferences and deductions that might elude an untrained person" was justified on less than probable cause); *Adams v. Williams*, 407 U.S. 143 (1972) (holding that where an informant had advised a police officer that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist, that the officer acted justifiably in reaching in and removing a loaded gun from the occupant's waistband after the occupant had rolled down his window rather than complying with the officer's request to open the car door). But see, *Florida v. J.L.*, 120 S. Ct. 1375 (2000) (anonymous tip of man with gun is an insufficient basis for stop and frisk).

but thought that there was little that it could do to control these practices through the exclusionary rule.²³³ After having ignored the racial factors in the case,²³⁴ the Court addressed the role that aggressive stop and frisk practices have on racial tensions between the police and minority communities:

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible to control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.²³⁵

The Court's observations of the racial tensions that surround stop and frisk practices in minority communities were not unique. Governmental commissions, law enforcement officials, and community organizers were asserting similar views²³⁶ and, while the Court soon cast a blind eye to this issue, thirty years after *Terry* the conflict between law enforcement and racial minorities continues to be raw and pronounced.²³⁷ Over this period of time, the Court has significantly expanded police powers (in many cases in deference to the "War on Drugs")²³⁸ and complaints concerning racial bias and random, arbitrary stop and frisks have continued to mount.²³⁹

²³³ 392 U.S. at 13-15.

²³⁴ See, Thompson, *supra* note 25, at 966-68 (discussing testimony that established that two of the three men thought to be acting suspiciously were black, a fact that first led the officer to observe their conduct).

²³⁵ *Terry*, 392 U.S. at 17 n.14.

²³⁶ E.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (KERNER COMMISSION); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967).

²³⁷ The Court's refusal to consider racial bias in the development of Fourth Amendment doctrine is well documented. E.g., Maclin, *Race*, *supra* note 25, at 336-38; Thompson, *supra*, note 25, at 962-83; Sklansky, *supra* note 25, at 316-17. At the same time, the evidence of the corrosive impact of racial bias in street level policing has been similarly well documented. E.g., CHRISTOPHER COMMISSION *supra* note 228; MOLLEN COMMISSION *supra* note 228; KENNEDY, *supra* note 76.

²³⁸ See, e.g., *Illinois v. Wardlow*, 120 S. Ct. 673, 676 (2000) (holding that flight of individual from police is a strong factor to be considered in determining reasonableness of stop); *Alabama v. White*, 496 U.S. 325 (1990) (holding that anonymous telephone tip, corroborated by independent police work, provided reasonable suspicion to make investigatory stop of defendant's vehicle); *United States v. Sokolow*, 490 U.S. 1 (1989) (holding that stopping a suspect based on drug courier profile was reasonable under Fourth Amendment standard); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that consent to a search can be voluntary even if suspect did not know that he could refuse search); *Adams v. Williams*, 407 U.S. 143 (1972) (holding that a police officer making a reasonable stop can conduct a limited protective search for weapons); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237 (1994) (arguing that judicial deference to aggressive police tactics in the War on Drugs has had a negative impact on certain constitutional principles).

²³⁹ E.g., Maclin, *Race*, *supra* note 25, at 336-38; MOLLEN COMMISSION, *supra* note 228.

The Court recently addressed the justifications for a *Terry* stop in a case where the police sought to justify a stop and frisk primarily on the basis of flight of the suspect.²⁴⁰ According to the police testimony, as a police caravan of four cars investigating drug trafficking in a "high crime" neighborhood passed, the defendant Wardlow looked in the direction of the officers and immediately fled, carrying an opaque bag.²⁴¹ A stop and frisk of the defendant disclosed a handgun.²⁴² The Supreme Court rejected the state's claim for a per se rule that flight would always justify a stop, but held that evidence of unprovoked flight was a factor that could be considered, among others, as to whether there is reasonable suspicion to believe that an individual was involved in criminal activity.²⁴³

The Court recognized that flight may be perfectly innocent activity ("not necessarily indicative of wrongdoing"), but is "certainly suggestive [of wrongdoing]."²⁴⁴ The Court conceded that there was no empirical evidence concerning the relationship of flight to criminal activity, but repeated its prior rulings that reasonable suspicion depends upon "commonsense judgments and inferences about human behavior."²⁴⁵ *Terry* itself "accepts the risk that officers may stop innocent people,"²⁴⁶ but the burden of showing something more than an "inchoate and unparticularized suspicion or 'hunch' of criminal activity" is all that is required by the Fourth Amendment.²⁴⁷

The majority ignored arguments concerning possible racial bias in the consideration of ambiguous factors like flight and presence in a high crime area.²⁴⁸ Further, the Court did not consider whether minorities might be more likely to flee upon the arrival of police. By contrast, the dissent specifically pointed to the belief, "particularly [among] minorities," that contact with the police could be dangerous even for innocent persons,²⁴⁹ and cited to law enforcement investigations, including those of the Attorneys General of New Jersey and Massachusetts, regarding racial profiling and stops without cause.²⁵⁰ Justice Stevens noted that news reports in New York demonstrated "that society as a whole is paying a significant cost in infringement of liberty by these virtually random stops."²⁵¹

²⁴⁰ *Illinois v. Wardlow*, 120 S. Ct. 673 (2000).

²⁴¹ *Id.* at 674-75. The officer could not recall whether the cars were marked. *Id.* at 683 (Stevens, J., dissenting).

²⁴² *Id.* at 675.

²⁴³ *Id.* at 676-77.

²⁴⁴ *Id.* at 676.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 677.

²⁴⁷ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²⁴⁸ Brief of Amici Curiae NAACP Legal Defense Fund at 4-5, 17-19, *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (No. 98-1036).

²⁴⁹ 120 S. Ct. at 680 (Stevens, J., dissenting).

²⁵⁰ *Id.* at 680-81, nn.8, 9 and 10 (Stevens, J., dissenting).

²⁵¹ *Id.* at 680-81 (Stevens, J., dissenting). Justice Stevens' comment that African-Americans

The *Wardlow* opinions simply pass each other by on the crucial issues of race and the relevance of empirical data on the standards that should control Fourth Amendment stop and frisk adjudication. What weight, if any, the Court would give to empirical evidence regarding the influence of race or the measurable relationship between alleged "suspicious" behavior and actual criminal conduct is not considered.²⁵²

Scholarly commentary on the Court's stop and frisk jurisprudence has addressed the remarkable retreat from consideration of racial impact, but has often proceeded without attention to empirical data. A symposium entitled "*Terry v. Ohio* 30 Years Later,"²⁵³ presented analysis by 30 prominent judges, scholars and lawyers, of the legal and political impact of *Terry* and its progeny. These presentations reflected longstanding divisions over competing Fourth Amendment theory,²⁵⁴ including the relevance of race in police street detentions.²⁵⁵ But in the absence of empirical data, the articles did not address the racial impact or the Fourth Amendment compliance rate of *Terry*

may tend to fear police more than whites, *id.*, received very little attention. By contrast, Federal District Judge Harold Baer was vilified for suppressing evidence in a narcotics case in an opinion that discounted the flight of the suspect from police on the ground that residents of minority communities in New York City may believe the police to be "corrupt, abusive and violent." See *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y. 1996). After calls for his impeachment, e.g., Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310-11 (1997), Judge Baer vacated his ruling. *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff'd*, 201 F.3d 116 (2d Cir. 2000).

²⁵² Judgments as to the relevancy and weight that should be assigned to particular human behavior are necessarily often subjective and imprecise. The Federal Rules of Evidence define as "relevant" any evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." FED. R. EVID. 401. This extremely broad definition allows for the "common sense judgments" the Court approved of in *Wardlow*, but also for consideration of empirical and statistical data. See *Frost v. Symington*, 197 F.3d 348, 356 (9th Cir. 1999) ("Scientific studies can have a corrective effect by establishing an apparently implausible connection or refuting an apparently obvious one, but, subject to such corrections, conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality." (citation omitted)); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997) (noting social science studies that show that there is no relationship between strength of the belief of the accuracy of one's identification and the actual accuracy of the identification in holding that jury instructions could not include a statement that the strength of identification may be taken into consideration in determining accuracy).

²⁵³ 72 ST. JOHN'S L. REV. 721 (1998).

²⁵⁴ E.g., Maclin, *Terry v. Ohio*, *supra* note 144; Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998) (discussing the conflicting understandings of the *Terry* decision); Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998) (promoting a conceptual framework for the Fourth Amendment based on the "proportionality principle").

²⁵⁵ Several of the articles discussed the racial tensions surrounding the stop and frisk practices, e.g., Maclin, *Terry v. Ohio*, *supra* note 144; Jack B. Weinstein & Mae C. Quinn, *Terry, Race and Judicial Integrity: The Court and Suppression During the War on Drugs*, 72 ST. JOHN'S L. REV. 1323 (1998), and others addressed application of the doctrine in lower court adjudication, e.g., George C. Thomas, III, *Terry v. Ohio in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion"*, 72 ST. JOHN'S L. REV. 1025, 1026-27 (1998).

stops and frisks. Whether or not *Terry* represents "A Practically Perfect Doctrine,"²⁵⁶ cannot be answered on a purely theoretical level. Empirical evidence concerning the points of tension in *Terry's* balance of the needs of law enforcement, the privacy and autonomy rights of individuals, and the imperative of racial equality, is an essential element of the constitutional calculus.

Studies of pedestrian stops have been undertaken in New York City and Philadelphia. The Philadelphia study was made pursuant to a Settlement Agreement in a class action lawsuit against the Philadelphia Police Department that was filed in the wake of a federal criminal investigation that uncovered systemic corruption and misconduct in narcotics enforcement. The study considered stops of pedestrians and cars for selected periods and for selected police districts in Philadelphia in 1997.²⁵⁷ For one-week periods in March and October, 1997, for four police districts in the City, every police-recorded stop of a car or a pedestrian was entered into a computer data base.²⁵⁸ The data were then analyzed to determine whether there were racial patterns of enforcement and whether police were exercising their stop and frisk power with sufficient cause or suspicion.²⁵⁹ The findings, though tentative in nature, raised serious questions concerning racial profiling and suspicionless stops and frisks. For example, in the Eighteenth District (West Philadelphia), where African-Americans constitute 70.3% of the population, for all pedestrian stops reported by the police for two different one-week periods in 1998, African-Americans were 93% of those stopped; whites constituted 4.7% of the stops.²⁶⁰ Of the 214 stops of African-Americans pedestrians during these periods, 135 were conducted without a legally sufficient written explanation.²⁶¹

In the Eighth Police District, where the population was 91.2% white and 6.5% African-American, African-Americans constituted 26.8% of all those stopped.²⁶² Moreover, in this district, while a sufficient reason was provided by the police for approximately 40% of all whites stopped, only 15% of African-Americans were stopped with a

²⁵⁶ Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998).

²⁵⁷ Fourth Philadelphia Report, *supra* note 41, at 1. It should be noted that there is even less reliable information made available by police departments concerning racial demographics and "cause" for pedestrian stops and frisks than for car stops and searches. Many departments require reports only when an arrest occurs and no department to my knowledge maintains a computer data base of this information. Indeed, in the two studies discussed in this Article, the information regarding pedestrian stops had to be individually transferred from handwritten police forms to computerized data fields.

²⁵⁸ *Id.* at 1-4.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 21-22, 26-27.

²⁶¹ *Id.* at 26-27. The police reporting form (the "75-48") requires the officer to provide a reason for any stop, frisk or arrest. *Id.* at 1-7.

²⁶² Fourth Philadelphia Report, *supra* note 41, at 28.

stated legally sufficient reason.²⁶³

While the statistical analysis did not control for crime rates and police deployment, the two factors that police officials and others have regularly cited as the primary reasons for any disparities in the gross numbers,²⁶⁴ the study pointed to two sets of data that could be interpreted to show racial bias in street stops and frisks. First, the same patterns of highly disproportionate stops of minority drivers and pedestrians were observed.²⁶⁵ Second, in stops in which the police failed to provide any reason for their intervention, the racial disparity was greater than for stops made with a recorded reason.²⁶⁶ Still, the Report recognized the need for further data collection and analysis.²⁶⁷

On the issue of whether there were sufficient grounds under the Fourth Amendment and state constitutional principles for the stops and frisks, the data showed that over one-third of all stops either failed to state any reason for the police action or, if stated, the reasons were manifestly inadequate under governing constitutional standards.²⁶⁸ In deference to the Police Department's response that many officers were simply not properly filling out the forms, as opposed to not having proper reasons for the stops, no conclusive findings were suggested. Commissioner Timoney has stated that the Department's review of stop data under the new police policies and practices shows a *50% reduction in the number of stops over comparable time periods*.²⁶⁹ This dramatic drop has occurred during a period of high numbers of arrests.²⁷⁰ Significantly, the percentage reduction correlates with the large number of improper stops made under the "old regime."²⁷¹ A study of the stops and arrests made during a one-week period in July, 1999, after the reporting form and new training had been implemented, demonstrated continued evidence of racial

²⁶³ *Id.*

²⁶⁴ *See, e.g.,* New York City Police Commissioner Howard Safir, Statement to the New York City Council Public Safety Committee (Apr. 19, 1999).

²⁶⁵ Fourth Philadelphia Report, *supra* note 41, at 18-28.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 31. The Report was issued at the time that a new Commissioner, John Timoney, was appointed to head the Police Department. Commissioner Timoney ordered that a revised form be developed for recording stops and frisks and that officers be specially trained with respect to their responsibilities in accurately recording all stops of cars and pedestrians. Fifth Philadelphia Report, *supra* note 41, at 4-10.

²⁶⁸ Fourth Philadelphia Report, *supra* note 41, at 10. For the Narcotics Strike Force, 57% of the recorded stops were facially deficient under the Fourth Amendment. *Id.* at 13. As I discuss below, it is both ironic and disturbing that it is the officers often credited with the most "expertise" who most frequently make stops of innocent persons.

²⁶⁹ Francis X. Clines, *Philadelphia Police Chief Borrows from Bronx Beat*, N.Y. TIMES, Jan. 16, 2000, § 1, at 16.

²⁷⁰ *E.g.,* Mark Fazlollah, *Arrests in Rapes Up 46% in 1999*, PHILA. INQUIRER, Mar. 20, 2000, at A-1.

²⁷¹ Fourth Philadelphia Report, *supra* note 41, at 12-15.

bias in this area of police work.²⁷² In comparing the stops of African-Americans in largely black police districts to stops made in largely white districts, the statistical data showed hugely disproportionate stops by race in the white areas of the City, while stops in African-American areas were roughly proportionate to the population in those areas.²⁷³ In some areas, there were more than ten times more stops of African-Americans as one would expect from the racial composition of the residential population.²⁷⁴

In 1999, the Attorney General of New York State conducted a study of 175,000 stops made by New York City police over a fifteen-month period in 1998-1999.²⁷⁵ This study was both broader in scope (analyzing every recorded stop made by the New York City Police Department for the 15 months), and statistically more sophisticated in its analysis of the data, including the use of regression analyses in its review of racial data, to ensure that the racial disparities reflected in the gross numbers were not explained by other factors, including differential crime rates among racial groups.²⁷⁶ The results of this study parallel the findings made in Philadelphia and present compelling empirical data of racial profiling and large numbers of stops without legal justification. The Attorney General made the following findings:

During the covered period, minorities—and blacks in particular—were stopped at a higher rate than whites, relative to their respective percentages within the population of New York City. Specifically, the Attorney General found:

1. Blacks comprise 25.6% of the City's population, yet 50% of all persons "stopped" during the period were black.²⁷⁷ Hispanics comprise 23.7% of the City's population, yet 33% of all "stops" were of Hispanics.²⁷⁸ By contrast, whites are 43.4% of the City's population, but accounted for only 12.9% of all "stops."²⁷⁹

2. This disparity in stop rates is particularly pronounced in precincts where the majority of the population is white.²⁸⁰ In precincts in which blacks and Hispanics each represent less than 10% of the total population, individuals identified as belonging to these racial groups nevertheless accounted for more than half of the total "stops" during the covered period.²⁸¹ Blacks accounted for 30% and Hispanics ac-

²⁷² Plaintiffs' Fifth Monitoring Report, *supra* note 41, at 1-2, 9-10, 20-26.

²⁷³ *Id.* at 20-25.

²⁷⁴ *Id.* at 26-27.

²⁷⁵ REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 88.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 94.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 94-95.

²⁸⁰ *Id.* at 106.

²⁸¹ *Id.*

counted for 23.4% of all persons "stopped" in these precincts.²⁸²

3. Precincts where minorities constitute the majority of the overall population tended to see more stop and frisk activity. Of the ten precincts showing the highest rate of "stop and frisk" activity (measured by "stops" per 1,000 residents), in only one (the 10th Precinct) was the majority of the population white.²⁸³

4. Significantly, the rate at which stops led to arrests during the covered period also differed by race. Overall, only one out of nine stops resulted in an arrest. This stop/arrest rate differed, however, based on the race of the person stopped.²⁸⁴ During the covered period, the NYPD "stopped" 9.5 blacks for every one "stop" which resulted in the arrest of a black, 8.8 Hispanics for every one "stop" that resulted in the arrest of a Hispanic, and 7.9 whites for every one "stop" that resulted in the arrest of a white suspect.²⁸⁵ These data are a strong indicator of racial discrimination as they are not affected by crime rates, police deployment, or other factors that might explain the racial disparities in the gross data regarding stops.

5. To test the hypothesis that higher crime rates in minority communities fully explain the higher rate at which minorities are stopped, various regression analyses were conducted.²⁸⁶ They demonstrated that differing crime rates alone cannot fully explain the increased rate of stops of minorities. For example, the Attorney General compared stop/arrest ratios for blacks to stop/arrest ratios for whites, and the same ratios for Hispanics and whites after accounting for the effect of differing crime rates.²⁸⁷ During the covered period, and after accounting for these factors, blacks were "stopped" 23% more often than whites, across all crime categories.²⁸⁸ In addition, after accounting for the effect of differing crime rates, Hispanics were "stopped" 39% more often than whites across crime categories.²⁸⁹

6. With respect to the issue of whether "reasonable suspicion" existed for the stops, the Attorney General found that citywide, 15.4% of all "stops" forms contained insufficient factual statements to justify a "stop."²⁹⁰ Further, the Attorney General noted that, "roughly one-quarter of all ['stop'] forms (23.5%) did not appear to provide sufficient information to allow a reader (including a police supervisor

²⁸² *Id.*

²⁸³ *Id.* at 100-01. For a discussion of "neighborhood" and crime, see Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999) (noting that the character of a neighborhood is often taken into consideration when establishing a reasonable suspicion that would justify a Terry stop).

²⁸⁴ REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 111.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 119-24, 130.

²⁸⁷ *Id.* at 123.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 160-62.

checking a junior officer's work) to determine whether the facts articulated amount to 'reasonable suspicion.'"²⁹¹

The Attorney General's Report provides much reason for concern. The racial disparities are simply too large to ignore and thousands of persons are being stopped and frisked without any legal justification.²⁹² There are sound reasons for courts and police departments to take these findings seriously. As the Supreme Court has stressed, the "touchstone" of Fourth Amendment jurisprudence is the "reasonableness" of the governmental conduct.²⁹³ Surely, if it is clear that the factors which the courts have endorsed as providing grounds for a "reasonable suspicion" of criminal activity or for suspecting that an individual is "dangerous," are empirically without foundation, the doctrinal calculus should be subject to modification.

The New York Attorney General's Report presents a significant challenge to the prevailing orthodoxy. First, by quantifying the arrest rates for persons stopped pursuant to investigative detentions and stop and frisk practices, we have a measure of the "success" rate for these police practices. Since reasonable suspicion is required to make these stops, there is now a statistical baseline from which we can judge whether the factors relied upon by the police sufficiently demonstrate this level of cause. Probable cause requires evidence that would lead a person of "reasonable prudence [to believe] that contraband or evidence of a crime will be found,"²⁹⁴ or to believe that there is a "fair probability" that the suspect has committed or is engaged in criminal activity.²⁹⁵ Reasonable suspicion requires an objective and articulable belief that criminal activity is afoot, and a frisk requires a reasonable belief that the suspect is armed and dangerous.²⁹⁶

²⁹¹ *Id.* at 162.

²⁹² Notwithstanding the substantial evidence of arbitrary police investigatory stops and searches, there is no indication of a change in official policy or practice. David Barstow, *View From New York Streets: No Retreat by Police*, N.Y. TIMES, June 25, 2000, § 1, at 1.

²⁹³ *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). See also, *Illinois v. Wardlow*, 120 S. Ct. 673, 675 (2000) (reiterating *Terry*'s holding that a police officer may stop a suspect upon a reasonable belief that criminal activity is afoot without violating the Fourth Amendment); *Skinner v. Ry. Labor Executives' Ass'n.*, 489 U.S. 602 (1989) (holding that alcohol and drug tests established by the Federal Railroad Administration were reasonable and thus did not violate the Fourth Amendment); *United States v. Sokolow*, 490 U.S. 1 (1989) (upholding stop of suspect by police officer based on reasonable suspicion that criminal activity was afoot). There has been a long-standing debate between a "probable cause/warrant preference" and a "reasonableness" interpretation of the Fourth Amendment. See, e.g., Amar, *supra* note 144, at 801 (suggesting that the core of the Fourth Amendment is reasonableness, not probable cause); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (discussing in detail the development of Fourth Amendment jurisprudence); Scott E. Sunby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994) (criticizing the greater reliance on the reasonableness doctrine in Fourth Amendment jurisprudence).

²⁹⁴ *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

²⁹⁵ *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (defining probable cause required to secure a search warrant).

²⁹⁶ E.g., *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968); *United States v. Cortez*, 449 U.S. 411, 417-18

The Court has not quantified these standards—other than to state that reasonable suspicion is “considerably less” than preponderance of the evidence²⁹⁷—but one would expect that where experienced police officers are engaging in practices that require a reasonable and articulable belief concerning possible criminal conduct, such conduct will be uncovered in more than a small percentage of the cases. If not, either the police are not being truthful in their assertions (a phenomenon that would not surprise those who have studied the criminal justice system),²⁹⁸ or the standards for stops and frisks are not sufficiently demanding. There can be no precise delineation of a statistical standard for various police interventions (ranging from full scale searches and arrests to stops and frisks of persons engaged in “suspicious” conduct), but categorical estimates are possible. Thus, while the answer to this question will reflect a normative judgment, some attempts to quantify have been made. Professor Slobogin, for example, suggests that stops and frisks should result in a 20% to 30% rate of determination of criminal conduct.²⁹⁹

In New York, only one in nine recorded stops resulted in an arrest³⁰⁰ and there is good reason to believe that thousands of additional stops that disclosed no criminal conduct were not recorded.³⁰¹ Moreover, some of the arrests were for conduct that occurred during the stop

(1981); *Illinois v. Wardlow*, 120 S. Ct. 673, 675 (2000).

²⁹⁷ *United States v. Sokolow* 490 U.S. 1, 7 (1989). The Court has insisted on information that distinguishes wrongdoers from the universe of innocent persons. *Reid v. Georgia*, 448 U.S. 438, 441 (1980).

²⁹⁸ For a discussion of police perjury, particularly in the context of suppression hearings, see H. RICHARD UVILLER, *TEMPERED ZEAL* 115-16 (1988) (noting the temptations for police to commit perjury); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311 (1994) (“Police perjury is the dirty little secret of our criminal justice system.”); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996) (“[C]riminal procedure scholars agree that police perjury is not exotic.”); Maclin, *Race*, *supra* note 25, at 379-86 (arguing that police perjury is a legitimate concern in pretextual traffic stops based on race); Christopher Slobogin, *Testifying: Police Perjury and What to do About it*, 67 COLO. L. REV. 1037 (1996) (discussing police perjury and ways to reduce it); Scott Turow, *Lying to Get the Bad Guys*, N.Y. TIMES, Feb. 20, 2000, § 4 (Week in Review), at 13; Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596 (discussing police perjury during probable cause hearings). The “code of silence” may also place substantial obstacles in proving improper police conduct. E.g., Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); Gilles, *supra* note 219; Jerome H. Skolnick, *Code Blue*, THE AMERICAN PROSPECT, March 27, 2000, at 49.

²⁹⁹ Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053, 1082-84 (1998); see also, C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1328-32 (1982) (survey of 164 federal judges disclosed a predominant range of 10%-50% level of certainty for establishing “reasonable suspicion,” with an average of 29.59%). On the issues presented by probabilistic proof compare Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 L. & SOC’Y. REV. 123 (1980-81) (arguing that mathematics has a role in the trial process), and Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) (discounting the use of mathematical techniques in the trial process).

³⁰⁰ REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 111.

³⁰¹ See *id.* at 66.

and frisk.³⁰² The statistics with respect to the Street Crimes Unit are even more revealing. This Unit is composed of highly experienced officers, a characteristic that the courts repeatedly state requires substantial weight in determining whether the officer's actions were reasonable.³⁰³ Not only was the success rate of this "experienced" unit poorer than the Department as a whole, but in the very category of policing in which they place their greatest emphasis—the removal of firearms from pedestrians—their record was the weakest.³⁰⁴ In only 2.5 of every 100 stops in which the factual predicate was suspicion that a suspect was carrying a weapon did the police find a firearm.³⁰⁵ There are two principle explanations for these troubling statistics. First, as discussed above, "reasonable suspicion" allows the police to effectuate stops and frisks on a relatively low quantum of evidence that permits broad "commonsense judgments" concerning human behavior.³⁰⁶ Historically the Court has permitted stops in situations in which the conduct observed is likely to be innocent, or the source of the information on which the stop is based is highly questionable.³⁰⁷ Thus, if the judgment is made that there are too many stops of innocent persons, a somewhat different calibration of the standards for these stops may be necessary.

Second, the police may be making stops without the requisite reasonable suspicion, by reason of misapplication of legal standards or the deliberate decision to ignore limitations on their powers. It is difficult to avoid the conclusion that in departments that promote aggressive policing tactics without institutional safeguards sufficient to protect against abuses, a large number of the stops of innocent persons are the product of random, arbitrary stops, particularly of minorities. Remedying this problematic situation is far more difficult. It will require first and foremost a substantial change in policy and

³⁰² *Id.* at 80-82.

³⁰³ It is almost a mantra of Fourth Amendment jurisprudence that the "experience" of the officer is a significant factor. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 699 (1996) (noting that "a reviewing court should take care . . . to give due weight to inferences drawn from . . . local law enforcement officers," when determining whether a stop based on probable cause is reasonable); *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person."); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (noting that the situation in the case should be, "distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."); *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968) ("It would have been poor police work indeed for an officer of 30 years' experience . . . to have failed to investigate . . . further.").

³⁰⁴ REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46, at 117-18.

³⁰⁵ *Id.* at 117 n.23.

³⁰⁶ *See Illinois v. Wardlow*, 120 S. Ct. 673, 676 (2000).

³⁰⁷ *See, e.g., Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (flight in itself can be a major factor for stop); *United States v. Sokolow*, 490 U.S. 1, 3 (1989) (upholding stop of airplane passenger based on drug courier profile factors); *Alabama v. White*, 496 U.S. 352 (1990) (upholding a stop based on information detailing normal daily activity from anonymous source).

practice in police departments that have tolerated random and suspicionless searches and strict internal monitoring, and supervision and discipline of officers and supervisors who engage or acquiesce in this type of policing.³⁰⁸ It will also require the courts to be far more skeptical of police testimony in both criminal and civil actions. And it will require a change in the application of legal doctrine, including substantive constitutional standards and remedial measures.³⁰⁹

While the issues of race bias and cause for stops and frisks are often addressed as distinct constitutional matters, not infrequently police investigative detentions present concurrent consideration of both factors. For example, in *Brown v. City of Oneonta*,³¹⁰ a police manhunt followed the report of an assault of an elderly woman in the town of Oneonta, New York.³¹¹ She informed the police that her attacker was a young black man and that he had cut himself on his hand during the incident.³¹² Fewer than 300 blacks lived in this town, and at a nearby State University, approximately 2% of the students were black.³¹³ The police made a "sweep" of the town, stopping and questioning over 200 black men and inspecting their hands for cuts.³¹⁴

In a civil rights suit, the court ruled that a selection of all black men for investigation in a case in which they had a racial description and a relatively small number of possible suspects, even though there was no description of anything beyond race and age ("young" black man), did not constitute intentional race discrimination.³¹⁵ According to the court, the police had a racial description, and it was not intentional race discrimination to investigate all persons in that racial group.³¹⁶

Having isolated and rejected race as a constitutional problem, the court proceeded to analyze the Fourth Amendment claims to determine whether any of the plaintiffs were "seized" by the police in their respective encounters.³¹⁷ The Supreme Court has ruled that a seizure occurs (thus mandating application of Fourth Amendment "cause" standards) only where the "force or show of authority" is sufficient to lead a reasonable person to believe that she is not free to leave.³¹⁸

³⁰⁸ For a more detailed analysis of effective remedial measures, see *infra* Part IV.

³⁰⁹ *Id.*

³¹⁰ 221 F.3d 329 (2d Cir. 2000).

³¹¹ *Id.* at 334.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 337-38.

³¹⁶ *Id.*

³¹⁷ *Id.* at 340.

³¹⁸ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (a person is "seized" within meaning of Fourth Amendment only when by means of physical force or show of authority his freedom of movement is restrained and in view of all of the circumstances a reasonable person would have believed that he was not free to leave). In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court found no coercive conduct sufficient to estab-

The circuit court recognized that the description of a young, black man was too vague to justify a stop,³¹⁹ and in assessing whether young, black men approached by the Oneonta police were subject to a "seizure," the court found such action where a police officer pointed a spotlight at the plaintiff, said, "[w]hat, are you stupid? Come here. I want to talk to you,"³²⁰ and instructed him to show his hands.³²¹

A second plaintiff was stopped and encircled by three police officers on the street, questioned as to whether he was a student and requested to produce his identification.³²² As he started to leave an officer asked him to come back and to see his hands.³²³ Again the court found a seizure.³²⁴ One can only speculate what would have happened to these individuals if they had refused the police command to stop and show their hands.³²⁵

Brown's equal protection analysis finesses the difficult issues. The fact that a description of a suspect includes a racial characteristic should be the start and not the end of the analysis. Race is surely an appropriate consideration in such an investigation, but where it becomes the "predominant" factor, strict scrutiny applies.³²⁶ Under this approach, a court should consider what other descriptive characteristics are known, the size of the potential community of "suspects," and the intrusiveness of the police investigation. Thus, it may be that a court should distinguish between benign forms of investigation (for example, a simple written inquiry to speak with the police) and a physical confrontation or forcible stop. Regardless of where the line should be drawn, the racial discrimination issue cannot be decided on the simplistic notion that any racial description permits a sweeping, intrusive inquiry. The disquiet that *Brown* produces results from of the artificial doctrinal lines that the Supreme Court has drawn around the Fourth and Fourteenth Amendments.

lish a seizure of an interstate bus passenger who, at a scheduled stop, was surrounded in the bus by armed narcotics officers, and "consented" to a search of her luggage. The Court ruled that a "reasonable person" could have felt free, "to decline the officers' requests or otherwise terminate the encounter." *Id.* at 436.

³¹⁹ *Brown*, 221 F.3d at 340.

³²⁰ *Id.* at 340.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ One commentator, incredulous that a federal court could uphold the stop of every black man in this town on the basis of the information in this case, described the affair as "Breathing While Black." Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29. The court in *Brown v. City of Oneonta* did state that it recognized the "sense of frustration that was doubtlessly felt by those questioned," and cautioned that police should "always be cognizant of the impressions they leave on a community," but thought these concerns had nothing to do with equal protection analysis. 195 F.3d at 120.

³²⁶ See *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (determining that strict scrutiny applies when race is the "predominant" consideration in drawing congressional district lines); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (applying strict scrutiny in analyzing affirmative action programs that awarded city construction projects).

Of course, beyond the substantive doctrinal issues, consideration must also be given to the remedial measures that may be available to persons subjected to unconstitutional police stop and frisk practices. Here, too, as I now explain, a web of doctrinal, procedural and practical barriers make vindication of protected rights far from a certainty.

IV. THE REMEDIAL FRAMEWORK

The principle that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,"³²⁷ has never been a truism in our constitutional framework, and both legislative and judicially imposed limitations on remedial mechanisms can preclude the relief necessary to vindicate the substantive legal claim.³²⁸ In this section, I explore potential remedies for racial profiling and random stops and frisks (suppression of evidence, civil damage actions, and equitable relief) to determine their availability and efficacy in these cases.³²⁹

A. Suppression of Evidence

The exclusionary rule will provide a remedy for some victims of illegal stops, but it is not well suited to provide systemic relief from racial profiling and random stop and frisk practices. First, as a doctrinal matter, if probable cause otherwise exists, racially discriminatory stops are not subject to the Fourth Amendment exclusionary rule,³³⁰ and the Supreme Court has yet to recognize a suppression remedy under the Fourteenth Amendment. Second, since most persons who are subjected to these practices are not arrested, the matter is never subject to criminal adjudication.

Third, where the police fail to comply with the substantive standards of the Fourth Amendment, limitations on the application of the exclusionary rule may still permit use of the evidence. Thus, the

³²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

³²⁸ As Professor Burbank has stated, "[s]ubstantive rights . . . are worth no more than the procedural mechanisms available for their realization and protection." Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1293 (2000).

³²⁹ This article does not address potential state causes of action or remedies for racial profiling and arbitrary stop and frisk practices. As has been well documented, however, state courts, interpreting state constitutions, have often provided greater protections from arrest and search practices than are required by the federal Constitution. See, e.g., David A. Harris, *Addressing Racial Profiling in the States*, 3 U. PA. J. CONST. L. 363 (2001).

³³⁰ *Whren v. United States*, 517 U.S. 806 (1996) (holding that police stops for traffic violations based upon probable cause do not violate the Fourth Amendment, even if the stops were pretextual). Some state courts have rejected *Whren* or otherwise held that racial bias in a stop or arrest is grounds for exclusion of evidence under search and seizure principles. E.g., *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

"standing" requirement,³³¹ the "good faith exception,"³³² and narrow conceptions of an individual's expectation of privacy,³³³ have significantly limited the potential remedial impact of the exclusionary rule.

Fourth, discovery in criminal cases is far more restricted than in civil litigation³³⁴ and therefore the evidence necessary to demonstrate that racial profiling is a practice or policy (the data that can be collected from records of other stops by the police department) will not be available to individual defendants. Moreover, even if the criminal discovery rules mandated disclosure of the records in other stops and searches, most defendants will not have the resources, time, or expertise to retrieve and analyze the documents, or to make the requisite statistical showing in support of a constitutionally-based suppression of evidence claim.

Fifth, many suppression motions turn on credibility, and where such a determination against a police officer requires the suppression of critical evidence, courts frequently decide these cases in favor of the prosecution notwithstanding the not-infrequent occasions of police perjury.³³⁵ The evidence that might persuade a court that an officer's version of the events is questionable or fabricated is normally not within the scope of the criminal discovery rules or within the investigative reach of a defense lawyer. For example, in litigation concerning car stops on I-95 in the Philadelphia area, civil discovery demonstrated that hundreds of cars were stopped *without adequate cause*; the police stopped cars at will and listed patently false reasons for the stop.³³⁶ In many instances the police gave no adequate reason for a stop (where no contraband was recovered) or falsely asserted

³³¹ See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (standing to contest the legality of a search restricted to persons who had a legitimate expectation of privacy in the items or premises searched); *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (possessory interest in items seized not enough to confer standing; defendant must have legitimate expectation of privacy with respect to someone else's purse and its contents).

³³² See, e.g., *United States v. Leon*, 468 U.S. 897, 922-24 (1984) (evidence of search not excluded where reasonable officer would believe search warrant stated probable cause, even though it did not).

³³³ See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (no reasonable expectation of privacy in trash); *Smith v. Maryland*, 442 U.S. 735 (1979) (no legitimate expectation of privacy in phone number dialed); *Oliver v. United States*, 466 U.S. 170 (1984) (open fields beyond the curtilage are not protected by the Fourth Amendment).

³³⁴ *United States v. Armstrong*, 517 U.S. 456 (1996) (limiting discovery on claim of selective prosecution based on race to instances where there is credible evidence that similarly situated defendants of other races had been treated differently); Andrew E. Taslitz, *Slaves no More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709 (1999) ("Pre-trial discovery in criminal cases is extraordinarily limited.").

³³⁵ See *supra* note 298.

³³⁶ See *Wilson v. Tinicum Township*, No. Civ. A. 92-6617, 1993 WL 280205, at *2 (E.D. Pa. July 20, 1993) (noting police excuse used to establish a "legitimate" stop); Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification at 7-9, *Wilson v. Tinicum Township*, No. Civ. A. 92-6617, 1993 WL 280205 (E.D. Pa. July 20, 1993) (No. 92-6617) (detailing incidents of illegal stops of cars and "routine" searches for drugs).

that a rear tail light was defective, a rear view mirror was obstructed by a hanging object, or that the driver was proceeding "recklessly."³³⁷ Affidavits from persons who were stopped in these circumstances rebutted the asserted justifications for the stops and strongly suggested that the police were engaged in a widespread practice of racial profiling and random car stops without even the minimal basis for a stop required by *Whren*.³³⁸ Further, police reports concerning alleged consent to search were seriously disputed by a large number of "innocent" subjects (and other witnesses) of these stops.³³⁹ Had this information been available to defendants in criminal cases arising from the drug interdiction program, more persuasive arguments could have been made on the credibility issues.³⁴⁰

A notable exception to the general ineffectiveness of the exclusionary rule as an antidote for pattern and practice violations is the litigation of suppression issues in *State v. Soto*,³⁴¹ the case that became the opening wedge in the New Jersey Turnpike racial profiling scandal.³⁴² Invoking New Jersey's comparatively liberal discovery procedures in cases alleging selective prosecution,³⁴³ the defendants in a consolidated motion to suppress challenging stop and search practices on the southern end of the Turnpike presented evidence that African-Americans were being stopped at rates that far exceeded their use of the Turnpike and they were authorized by the trial court to discover a broad range of police documents relating to all stops and searches by state police for the relevant time period.³⁴⁴ These documents, statistical studies of the data, and internal operating documents of the state police were sufficient to prove an extraordinary pattern of racial profiling and, under state law principles, the trial court suppressed the evidence in the cases.³⁴⁵

³³⁷ Plaintiffs' Memorandum at 3-6, *Tinicum Township* (No. 92-6617).

³³⁸ Exhibits to Plaintiffs' Memorandum, *Tinicum Township* (No. 92-6617).

³³⁹ *Id.*

³⁴⁰ Review of the files in which contraband was found disclosed that the courts rejected suppression motions in great majority of the cases. Occasionally, however, a trial judge found the police testimony simply too incredible. In one case, the court found a stop of a car with three black males made on the allegation that a small ornament from a rear view mirror "materially obstructed" the driver's view through the windshield to be insufficient to establish cause for the stop. *Commonwealth v. Miller*, No. 4627-91 (Pa. Ct. Com. Pl. of Del. County Crim. Div. Sept. 9, 1992).

³⁴¹ 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

³⁴² See William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, CHAMPION, Sept.-Oct. 1999, at 14.

³⁴³ See *State v. Kennedy*, 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991) (statistical survey was sufficient to raise colorable claim of selective enforcement of traffic laws against minorities and to permit discovery of internal state police records).

³⁴⁴ *Soto*, 734 A.2d at 352.

³⁴⁵ *Id.* at 352-58, 361. The state filed a notice of appeal but subsequently withdrew its appeal at the time that the Attorney General of New Jersey issued the "Interim Report" on racial profiling on the Turnpike. See also *Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) (rejecting the doctrine of *Maryland v. Wilson*, 519 U.S. 408 (1997), stating that the doctrine creates a police power providing, "a clear invitation to discriminatory enforcement"). Justice Ireland

As the evidence concerning racial profiling continues to develop, some courts may be more receptive to pattern- and practice-type discovery and proof in the criminal suppression hearing. However, it is unlikely that the exclusionary rule will engender systemic change in police practices in these areas.

B. Civil Damage Actions

The federal civil rights act, 42 U.S.C. § 1983, provides for damages for harm caused by unconstitutional stops and searches conducted by state or local officials.³⁴⁶ Claims against federal defendants (usually in the context of border, customs and airport searches) can be maintained directly under the Constitution as a *Bivens* action,³⁴⁷ or under the Federal Tort Claims Act.³⁴⁸ The case law and commentary on Section 1983 and *Bivens* actions is extensive and I will comment briefly only on the potential uses and limitations of damage actions as a means of providing redress to persons unlawfully stopped or searched, and as a means of effectuating systematic reforms.

Damage awards have some potential for triggering institutional reforms. Large verdicts in cases involving unconstitutional practices or customs may deter future misconduct. Proof of racial bias has led to significant damages in the police misconduct context.³⁴⁹ Where un-

noted the widespread public concern with racial profiling and stated that the broad discretion provided by *Wilson* would contribute to this problem. *Id.* at 669-700 (Ireland, J., concurring).

³⁴⁶ See generally, MICHAEL AVERY, KAREN BLUM & DAVID RUDOVSKY, *POLICE MISCONDUCT: LAW & LITIGATION* (3d ed. 1999); SHELDON NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION* (4th ed. 1999).

³⁴⁷ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that plaintiffs can sue federal defendants in federal court for Fourth Amendment violations). See also, *Carlson v. Green*, 446 U.S. 14 (1980) (holding that a remedy was available directly under the Constitution even though allegations could also support a suit under the Federal Tort Claims Act); *Chappell v. Wallace*, 462 U.S. 296 (1983) (unique disciplinary structure of military establishment and Congress' activity in field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers).

³⁴⁸ Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

³⁴⁹ E.g., *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 1999) (affirming award of \$245,000 for racially-motivated arrest and use of excessive force); *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993) (allowing \$90,000 compensatory damages for unlawful arrest and excessive force, while award of \$450,000 in punitive damages remanded for further consideration by the district court); *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987) (where racially motivated conduct had a "profound and lasting effect" on plaintiff, court sustains award of \$375,000 plus attorneys' fees). In the highway racial profiling cases, there have been significant settlements (often joined with affirmative relief by way of consent decree) that have been effective in changing practices. See, e.g., Robert Jackson, *Eagle County Must Pay for Stopping Motorists*, ROCKY MOUNTAIN NEWS, Nov. 10, 1995, at A4 (reporting \$800,000 settlement of racial profiling claim based on litigation, *Whitfield v. Board of County Comm'rs*, 837 F. Supp. 338 (D. Colo. 1993)); Settlement Agreement, *Wilson v. Tincum Township*, No. 92-6617 (E.D. Pa. Jan. 19, 1995). By contrast, an initial settlement in the I-95 litigation in Maryland in *Wilkins v. Maryland State Police*, C.A. No. 93-468 (D. Md. 1996), failed to end racial profiling and new litigation has been initiated. See *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560 (D.

constitutional practices affect large numbers of persons, as is the case with racial profiling and random stops and searches, the potential damages exposure is commensurately substantial, and governmental agencies may seek to avoid large judgments by a change in practices and policies. Thus, while most commentators have correctly asserted that civil damage actions are not an effective means of achieving systemic or institutional change,³⁵⁰ in selected areas, the conventional wisdom may not control.

Other limitations of the damages remedy are well recognized. First, not every violation of a Fourth or Fourteenth Amendment right will establish an entitlement to a damages remedy. The doctrine of qualified immunity provides a broad scope of protection from individual liability from damages where the right asserted was not "clearly established,"³⁵¹ or where a reasonably well-trained officer would not have known that his *conduct* would violate the Constitution.³⁵² In *Hunter v. Bryant*,³⁵³ the Court ruled that immunity would protect an officer if it was reasonable to believe that probable cause existed, even if it did not.³⁵⁴ Chief Judge Newman has criticized this conceptual formulation:

It is not readily apparent how a police officer could have an objectively reasonable belief that conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable police office would not have acted. And the situation is especially perplexing in a case like the pending one where, for purposes of removing the first issue from the jury, it has been determined, correctly in our view, that no reasonable juror could fail to find that the officer's conduct was unlawful.

Nevertheless, we have been authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity.³⁵⁵

Md. 1999).

³⁵⁰ E.g., Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 499-503 (1997).

³⁵¹ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

³⁵² *Anderson v. Creighton*, 483 U.S. 635 (1987).

³⁵³ 502 U.S. 224 (1991) (per curiam).

³⁵⁴ *Id.* at 227-28.

³⁵⁵ *Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994); see also *Karnes v. Skrutski*, 62 F.3d 485, 491n.3 (3d Cir. 1995) ("There is no conflict in saying a police officer who acted unreasonably nevertheless reasonably (but mistakenly) believed his conduct was reasonable.") By contrast, where a claim is based on intentional race discrimination, qualified immunity should not be a bar to recovery, since the prohibition against intentionally biased conduct has been so widely and emphatically established. E.g., *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984). On the Court's qualified immunity jurisprudence, see, Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

Eleventh Amendment immunity and the statutory limitations on municipal liability may preclude recovery from the only sources that can actually satisfy a judgment. The Eleventh Amendment prohibits suit against a state or state entity (e.g., the Division of State Police) for damages,³⁵⁶ and under the Court's section 1983 jurisprudence, a municipal employer is liable only if the constitutional violation was caused by a municipal law, policy, practice, or custom.³⁵⁷

As a practical matter, very few violations of the rights of motorists or pedestrians are likely to be filed as civil rights actions. Where contraband is discovered and a criminal prosecution initiated, any civil case must normally await the outcome of the criminal process, and may be precluded by findings and judgments made in the criminal litigation.³⁵⁸ Even if there is no legal preclusive effect, the fact of the criminal conviction may undermine any civil suit. Moreover, even where the criminal case is disposed of favorably to the defendant, if the contraband can still be fairly attributed to him, juries are unlikely to provide compensation, even for clear constitutional violations.

In cases in which no contraband is found, and a strong legal claim for damages can be stated, the damages may be too modest to justify full-scale litigation. Absent particularly harsh or malicious conduct, the damages that flow from a relatively short stop and incidental frisk or search, may appear to be nominal to some juries.³⁵⁹ As a result, such cases are not likely to attract competent counsel.³⁶⁰ Moreover, many civil rights plaintiffs are burdened by racial and class characteristics that may prejudice juries against them. Jurors tend to dismiss their allegations, often awarding them less than a full measure of

³⁵⁶ *Hans v. Louisiana*, 134 U.S. 1 (1890). *But see* *Hafer v. Melo*, 502 U.S. 21 (1991) (holding that state officials, sued in their individual capacity, are not immune under the Eleventh Amendment).

³⁵⁷ *Board of County Comm'rs v. Brown* 520 U.S. 397 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). Section 1983 has also been interpreted to bar civil rights actions by persons convicted of crimes whose convictions have not been reversed or vacated, if success of the civil rights claims, "would necessarily imply the invalidity of the [plaintiff's] conviction." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). *See also*, *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (noting that section 1983 actions are not available where plaintiff's claim would imply the invalidity of his parole revocation). This doctrine may bar suits by persons who have been convicted based on events that transpired during the car or pedestrian stop, where the civil damage claim is based on alleged constitutional violations that occurred during the same incident. *E.g.*, *Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999) (noting that plaintiff's complaint would be barred if it would suggest that plaintiff's criminal conviction was invalid); *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996) (affirming dismissal of section 1983 complaint based on false arrest and excessive force during an arrest where plaintiff had been convicted of possession of a firearm and battery of an officer based on the same event).

³⁵⁸ *See, e.g.*, *Heck*, 512 U.S. at 487 (holding that plaintiff cannot bring a section 1983 claim that would challenge the plaintiff's underlying conviction).

³⁵⁹ *See* David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. REV. 465, 490-91 (1992).

³⁶⁰ *Id.*

compensation.⁵⁶¹

The prospects change radically, however, if claims can be joined, and particularly if a class action can be maintained. By the very nature of drug interdiction and related car and pedestrian stop operations, thousands of persons may be subjected to unlawful practices. The case for liability becomes exponentially stronger with the supportive allegations and testimony of hundreds or thousands of "innocent" victims of governmental overreaching, and the damage claims become substantial enough to sustain federal litigation. Fear of damages could cause governmental units to reconsider their practices and policies, but are generally insufficient, standing alone, to effectuate institutional change.⁵⁶²

C. Injunctive Relief

Federal injunctive relief against state or local officers upon a showing of a violation of federal constitutional or statutory rights is potentially the most effective and far-reaching remedial mechanism for preventing future violations of rights. The injunctive action is not encumbered by personal immunities and the Eleventh Amendment bar is avoided under the *Ex Parte Young* doctrine.⁵⁶³ However, the federal court's equitable powers are circumscribed by federalism, comity, and standing doctrines.⁵⁶⁴ To establish a claim for equitable relief, the plaintiff must meet the ordinary requirements for an injunction: that legal remedies are inadequate and that plaintiff is in danger of sustaining substantial and immediate injury if the injunction is not granted.⁵⁶⁵

The requirement of a likelihood of future injury has been treated by the Supreme Court as a separate jurisdictional component: that the plaintiff must show a "credible threat" and not mere "conjectural" future injury.⁵⁶⁶ In *City of Los Angeles v. Lyons*,⁵⁶⁷ the plaintiff was stopped by Los Angeles police officers for a traffic violation.⁵⁶⁸ After Lyons got out of his car, the officers drew their guns, ordered him to place his hands on top of his head and, without provocation, placed

⁵⁶¹ *Id.* (citation omitted).

⁵⁶² It seems clear that many jurisdictions consider payments to victims of misconduct part of the "cost of policing." See Bandes, *supra* note 67, at 1337-38 (noting that New York City paid over \$31 million dollars in settlements and judgments in 1998, but failed to take action against officers responsible for the misconduct).

⁵⁶³ *Ex Parte Young*, 209 U.S. 123 (1908); *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991).

⁵⁶⁴ *Lewis v. Casey*, 518 U.S. 343 (1996); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

⁵⁶⁵ *Lyons*, 461 U.S. at 103; *Allee v. Medrano*, 416 U.S. 802, 814 (1974).

⁵⁶⁶ *Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494-96 (1974).

⁵⁶⁷ 461 U.S. 95 (1983).

⁵⁶⁸ *Lyons*, 461 U.S. at 97.

him in a chokehold causing damage to his larynx.³⁶⁹ The Supreme Court ruled that Lyons had not proved a sufficient likelihood that he would again be subject to a police chokehold to make out a case or controversy on his request for an injunction.³⁷⁰

The Court stated:

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.³⁷¹

While the first condition appears draconian, the alternative ground for standing, that the conduct sought to be enjoined is officially authorized, may be more easily established in racial profiling cases, where a pattern and practice of illegal stops of large numbers of persons is proven.³⁷² Where the alleged unconstitutional conduct is the product of official policy or practice, there is a far greater likelihood that the conduct will be repeated and that a plaintiff who engages in activities that will bring him into the purview of those practices will suffer future injury. The existence of a policy that will directly affect the plaintiff or members of plaintiff class may be sufficient to establish standing.³⁷³

³⁶⁹ *Id.* at 114-15 (Marshall, J., dissenting)

³⁷⁰ *Id.* at 110.

³⁷¹ *Id.* at 105-06.

³⁷² See, *Lyons*, 461 U.S. at 113-37 (1983) (Marshall, J., dissenting); *Allee v. Medrano*, 416 U.S. 802, 815 (1974) (holding that where there is a pattern of police misconduct in suppressing organized labor activities, injunctive relief is appropriate); Richard H. Fallon, Jr., *Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) (noting that under the standing test set out in *Lyons*, a plaintiff must show present and continuing injuries).

³⁷³ See, e.g., *Deshawn E. v. Safir*, 156 F.3d 340 (2d Cir. 1998) (noting that police interrogation practices subject to equitable relief, but court dismisses claim based on failure of proof); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996) (finding that the fourteen named plaintiffs have standing to obtain statewide injunctive relief against the state police where illegal citation practices were the result of official practice and policy); *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1993) (finding that plaintiffs had standing where "numerous instances of police misconduct have occurred in a small six by seven block area, [and] some minority residents of the area have been mistreated by deputies more than once"); *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1135-36 (N.D. Cal. 2000) (finding that NAACP and LULAC have standing in racial profiling suit). In *Maryland State Conference of NAACP Branches v. Maryland Department of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999), the Court stated:

Here, the plaintiffs' likelihood of injury depends only on their status as a member of a minority group and their need to travel on I-95. An "illegal" action on their part associated with the future stop need be no more than a minor, perhaps unintentional, traffic infraction; indeed, according to their allegations, they may be stopped even if no traffic violation has been committed. The plaintiffs also have reason to expect they will continue to travel on I-95. This combination of alleged past injury, an earlier pattern and practice finding, and the plaintiffs' likely future travel is sufficient to confer standing. (emphasis added).

The Supreme Court distinguished *Lyons* in *Friends of the Earth v. Laidlaw Environmental Services*,³⁷⁴ in granting Article III standing to plaintiffs in an environmental lawsuit challenging the pollution of a river.³⁷⁵ The plaintiffs alleged that they had suffered "injury in fact" as they were deterred from using the river for recreational purposes.³⁷⁶ The Court ruled that there was "nothing 'improbable' about the proposition that a company's continuous and pervasive discharge of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."³⁷⁷ The Court ruled that *Lyons* did not bar the action as the unlawful conduct was occurring at the time of the filing of the complaint,³⁷⁸ a holding that confirms the significant difference between allegations of occasional unlawful conduct and practice and policy cases. Of course, a polluted river can affect everyone using that water source while racial profiling on highways randomly affects thousands out of a much larger class of drivers. Thus, the question becomes whether once a policy of racial profiling is established, it would be "improbable" for minorities to avoid certain highways or for certain members of the minority group to be stopped on those roads.³⁷⁹

Beyond the "official policy" argument, there are several grounds for distinguishing *Lyons*. First, the Court stressed that the past encounter would only repeat itself if *Lyons* would again violate the law, thus prompting a police stop, and the highly unusual improper application of a chokehold.³⁸⁰ But as the courts have recognized, where for reasons beyond the control of the plaintiff, she is unable to avoid repeating the conduct that led to the original injury, there is a greater likelihood of future injury justifying injunctive relief.³⁸¹ In racial profiling cases where the claim is made that the stop is based on an immutable characteristic and that the plaintiff has not engaged in unlawful activity, this distinction may be sufficient to provide stand-

³⁷⁴ 120 S. Ct. 693 (2000).

³⁷⁵ *Id.* at 705-06.

³⁷⁶ *Id.* at 704-06.

³⁷⁷ *Id.* at 706; see also *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156-61 (4th Cir. 2000) (en banc) (following *Laidlaw* in determining that plaintiff had standing where plaintiff's use of a waterway was reduced by defendant's actions).

³⁷⁸ *Laidlaw*, 120 S. Ct. at 706.

³⁷⁹ In *City of Erie v. Pap's, A.M.*, 120 S. Ct. 1382 (2000), the Court, citing *Laidlaw*, found an appeal not moot even in the face of a party's declaration that it would not seek to engage in the challenged conduct in the future. The mere possibility of renewed conduct was deemed sufficient to permit adjudication. *Id.* at 1390.

³⁸⁰ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983).

³⁸¹ *Honig v. Doe*, 484 U.S. 305, 320 (1988) (finding that emotionally handicapped individual cannot conform his conduct to socially acceptable norms; therefore, it is reasonable to expect that he will again engage in classroom misconduct); see also, *Church v. City of Huntsville*, 30 F.3d 1332, 1337-78 (11th Cir. 1994) (homeless persons had standing to seek injunction preventing city from implementing policy of isolating and/or removing homeless persons).

ing.³⁸²

Moreover, the conduct adversely affects a class of persons by reason of the invidious characteristic of race. In *Lyons*, the Court may have been reluctant to make a definitive ruling on chokeholds (which are permissible in some circumstances) without the presence of a party who had a clear stake in the outcome. Racial bias in policing can never be justified and permitting a challenge to such practices by persons who might not otherwise have standing to challenge police policies would be consistent with the Court's willingness to grant broad standing to challenge racially discriminatory practices.³⁸³

Second, *Lyons* was subjected to the chokehold on only one occasion and the record in the case demonstrated that this type of force, while serious and at times deadly,³⁸⁴ was infrequently employed by the Department.³⁸⁵ By contrast, racial profiling plaintiffs, either individually or as members of a class, may have been subjected to numerous stops. Thus, in cases where the plaintiffs alleged repeated stops and a pattern of unconstitutional stops and searches of others, the lower courts have found standing to invoke the court's equitable powers.³⁸⁶ Where a class action is certified, standing should be determined by aggregating all of the factual claims of the class members.³⁸⁷ Under current doctrine, however, a court may still view the likelihood of future injury as to any particular person to be remote (in profiling situations, given the large number of drivers even a policy of stopping racial minorities may not lead to repeated stops of a particular person), and for that reason rule that a practice that affects thousands of persons is insulated from judicial equitable review because most individuals are not likely to be the victim on more than one occasion.³⁸⁸

³⁸² E.g., *Anderson v. Cornejo*, No. 97 C 7556, 1999 U.S. Dist. LEXIS 519 (N.D. Ill. Jan. 11, 1999); *National Cong. for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999).

³⁸³ See *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) (noting that plaintiff who resides inside a district that was created through "a gerrymandered districting scheme" had standing); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that white defendant had standing to object to exclusion of black prospective jurors from his trial); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (finding that tenants who sued owner for racial discrimination under the Civil Rights Act of 1964 had standing through the Court's "generous construction" of the Act).

³⁸⁴ See *Lyons*, 461 U.S. at 113-15 (Marshall, J., dissenting).

³⁸⁵ *Id.* at 110.

³⁸⁶ See *id.* at 111-13 (noting that injunctive relief is available upon a showing that there is "a sufficient likelihood that [plaintiff] will again be wronged in a similar way"). By contrast, in *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (en banc) the court ruled that two individuals who had each been stopped once over a several-year period and who regularly drove in the area in which they claimed illegal "border" stops were being made, lacked standing to challenge the actions of the Border Patrol.

³⁸⁷ See e.g., *Sosna v. Iowa*, 419 U.S. 393, 397-403 (1975) (upholding standing of class even where individual who brought the suit no longer met the class requirements); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985) (upholding class action lawsuit brought by minorities against the INS). However if the plaintiff lacks standing, the case may be dismissed prior to class certification. *Hodgers-Durgin*, 199 F.3d at 1042.

³⁸⁸ E.g., *Hodgers-Durgin*, 199 F.3d at 1042; *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053

D. Federal Government Intervention

The Violent Crime Control and Law Enforcement Act of 1994 authorizes the United States, through the Attorney General, to bring civil actions for declaratory or equitable relief against police departments engaged in a pattern or practice of deprivation of constitutional or statutory rights.⁵⁸⁹ The statute provides potentially broad grounds for intervention and relief, but until recently practical political realities muted the law's potential reach.⁵⁹⁰ Since 1994, the DOJ has taken legal action against five law enforcement agencies: it has reached consent decrees with the City of Pittsburgh, Pennsylvania, the City of Steubenville, Ohio,⁵⁹¹ and the State of New Jersey (with respect to the racial profiling on the New Jersey Turnpike).⁵⁹² It has reached a Settlement Agreement with Montgomery County, Maryland (racial profiling on I-95)⁵⁹³ and has initiated litigation against the Columbus, Ohio Police Department.⁵⁹⁴

(N.D. Ill. 1998). Another potential bar to injunctive relief is the decision in *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), where the Court, relying heavily on principles of federalism, reversed an injunction requiring a police department to more effectively investigate and adjudicate civilian complaints of abuse. The Court was not persuaded that the evidence was sufficient to demonstrate a pattern and practice of misconduct within the police department and cautioned against intrusive federal court intervention in local government operations. *Id.* However, in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court ruled that an evidentiary showing that a municipality's policy, practice, or custom caused the constitutional violation is sufficient to warrant a judgment against the municipality. *See also*, *City of Canton v. Harris*, 489 U.S. 378 (1989) (municipal liability is established where city is deliberately indifferent in its training of police and lack of training causes a constitutional violation). Under this standard, it would appear that the municipality would be liable for damages and would be subject to equitable relief for a proven unconstitutional practice, policy, or custom.

As noted above, the barriers created by *Lyons* and *Rizzo v. Goode* have been overcome in some cases, and consent decrees and settlement agreements have provided effective remedial mechanisms. *E.g.* Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, C.A. No. 96-6045 (E.D. Pa. 1996) (on file with author); Julia C. Martinez, *Settlement Reached in Tinicum Suit*, PHILA. INQUIRER, Oct. 6, 1994, at B1; *see*, Wilson v. Tinicum Township, No. Civ. A. 92-6617, 1993 WL 280205 (E.D. Pa. July 20, 1993) (granting motion for class certification based on racial profiling on highway stops). As I discuss in the following section, the United States has also entered into Consent Decrees requiring reform of police practices.

⁵⁸⁹ 42 U.S.C. § 14141 (1995). For a discussion of the implementation of the Act by the Department of Justice, *see* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999); Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL'Y REV. 149 (1998).

⁵⁹⁰ Livingston, *supra* note 389, at 841-850.

⁵⁹¹ *Id.* at 815-16.

⁵⁹² *See infra* note 395 and accompanying text.

⁵⁹³ *Id.*

⁵⁹⁴ Livingston, *supra* note 389, at 815-16. The federal government (as well as local prosecutors) may bring criminal prosecutions against police officers who violate or conspire to violate civil rights. 18 U.S.C. §§ 241, 242 (1994). However, these criminal statutes require the government to prove a specific intent to deprive the victim of a constitutional right, *United States v. Guest*, 383 U.S. 745, 760 (1966), a factor that the Department of Justice often cites in refusing to

The Department of Justice and private litigators have crafted consent decrees and other settlement agreements that mandate sweeping structural and institutional reforms.³⁹⁵ These settlements and consent decrees require police departments to collect and maintain a wide range of information (in computerized form) that is critical to the effective internal management of departments and to external monitoring of abuse and corruption issues. Properly designed and implemented, these monitoring systems have the potential for remedying misconduct in the same way that COMPSTAT systems have helped police recognize patterns of criminal conduct.³⁹⁶ In the area of racial profiling, the decrees mandate that race not be considered in a decision to stop or search (unless the police are acting on a specific description) and that in all stops, searches, and arrests, the department record and maintain information as to the race of the suspect and the reasons for the police action.³⁹⁷ Further, departments are required to computerize their record-keeping operations in a manner that creates accessible fields of relevant information.³⁹⁸

Police departments are also mandated to initiate early warning systems to alert Commanders and outside monitors of troublesome trends or performances before they become acutely dangerous to the public.³⁹⁹ Officers who are involved in a disproportionate number of

prosecute police officers. But even without this difficult burden of proof it is unlikely we would see many more prosecutions. Prosecutors do not embrace the prosecution of fellow law enforcement officers and even when they are motivated to act, the code of silence within most departments and jury sympathy for police officers may make the prosecution highly problematic. In the area of stops and searches, unless the incident escalates into the use of deadly force, the significance of any one case will be relatively minor, thus presenting an additional reason for federal officials to pass on criminal prosecution.

³⁹⁵ *E.g.*, Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, *supra* note 388; Consent Decree, United States v. City of Pittsburgh, C.A. No. 97354 (W.D. Pa. 1997); Consent Decree, United States v. State of New Jersey, C.A. No. 99-5970 (D.N.J. 1999); Memorandum of Agreement Between United States Department of Justice and Montgomery County, Md., et al., Jan. 18, 2000. Much of the incentive for change resulted from unconscionable acts of brutality and corruption, including the Rodney King beating, the shooting of Amadou Diallo and the brutalization of Abner Louima in New York, the massive corruption and misconduct scandals in the New York, Los Angeles, Chicago, Philadelphia, and New Orleans Police Departments, and the growing sentiment and expressions of resentment and anger in minority communities over the day to day practices and policies of police agencies. And, as recent events powerfully demonstrate, pervasive corruption and misconduct continues in some departments. *E.g.*, CHRISTOPHER COMMISSION, *supra* note 228; MOLLEN COMMISSION, *supra* note 228; Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, *supra* note 395; INTERIM REPORT OF ATTORNEY GENERAL OF NEW JERSEY, *supra* note 32; REPORT OF ATTORNEY GENERAL OF NEW YORK, *supra* note 46; Todd S. Purdum, *Los Angeles Police Officer Sets off Corruption Scandal*, N.Y. TIMES, Sept. 18, 1999 at A9 (describing largest corruption scandal in 60 years, involving framing of defendants); James Sterngold, *Police Corruption Inquiry Expands in Los Angeles*, N.Y. TIMES, Feb. 11, 2000, § 1, at 16.

³⁹⁶ See BRATTON & KNOBLER, *supra* note 76, at 233-239.

³⁹⁷ Consent Decree, United States v. New Jersey, *supra* note 395; Memorandum of Agreement Between the United States Department of Justice and Montgomery County, Md., United States v. Montgomery County, *supra* note 395.

³⁹⁸ See *supra* note 395.

³⁹⁹ Consent Decree, United States v. City of Pittsburgh, *supra* note 395, at 6-9.

questionable stops or searches, use of force, or other discretionary conduct, or who are the subject of repeated civilian complaints, can be identified and counseled and re-trained even before disciplinary action may be warranted. The consent decrees require departments to ensure the integrity and fairness of internal affairs investigations into civilian complaints.⁴⁰⁰

The New Jersey Turnpike Agreement prohibits troopers from considering the race, nationality, or ethnicity of motorists or passengers in determining which vehicles to stop or in "enforcement action or procedure" (e.g., searches), unless race or national or ethnic origin was part of a description of a suspect.⁴⁰¹ To effectuate this policy, the Consent Decree requires officers to record data on motor vehicle stops, including the gender and race or ethnicity of the driver and any passenger who was the subject of a "procedure," and the reason for the stop and any search resulting from the stop.⁴⁰² Further, supervisors must review troopers' reports on stops and may also review the corresponding audio/visual tapes.⁴⁰³ When such review reveals a possible violation of the provisions of the decree or shortcomings in meeting the reporting or recording requirements, "nondisciplinary" action such as counseling or more training may be ordered.⁴⁰⁴

New Jersey is also required to develop a "Management Awareness Program" that uses the data collected by troopers, the results of investigations, and other sources to "identify and modify potentially problematic behavior" by troopers.⁴⁰⁵ Data analyses under the MAP must include:

[A] comparison of racial/ethnic percentages of motor vehicle stops (by reason for the stop . . .) and racial/ethnic percentages of enforcement actions and procedures taken in connection with or during the course of such stops, with a benchmark racial/ethnic percentage if available;

[A] comparison of racial/ethnic percentages for such stops with the racial/ethnic percentages for enforcement actions taken in connection with or during the course of such stops;

⁴⁰⁰ *Id.* 23-33.

⁴⁰¹ Consent Decree, *United States v. State of New Jersey*, *supra* note 395.

⁴⁰² There are significant limitations on consent searches: state troopers may request consent to search a motor vehicle only where troopers can articulate a reasonable suspicion that a search would reveal evidence of a crime; every consent search of a vehicle must be based on written consent of the driver or other person authorized to give consent which precedes the search; the scope of the consent is limited to the scope of the consent that is given by the driver or other person authorized to give consent; the driver or other person authorized to give consent is advised of such right; that the driver or other person authorized to give consent who has granted written consent may orally withdraw that consent at any time during the search without giving a reason; and state troopers immediately must stop a consent search of a vehicle if and when consent is withdrawn. *Id.* These provisions are more restrictive than Fourth Amendment doctrine. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (searches under Fourth Amendment must be reasonably based on the totality of the circumstances).

⁴⁰³ Consent Decree, *United States v. State of New Jersey*, *supra* note 395, at 18-24.

⁴⁰⁴ *Id.* at 23-33.

⁴⁰⁵ Consent Decree, *United States v. State of New Jersey*, *supra* note 395, at 18-23.

[A] comparison of racial/ethnic percentages for consent searches of vehicles, and requests for consent to search vehicles, with "find" rates by race/ethnicity for motor vehicle consent searches;

[A] comparison of racial/ethnic percentages for non-consensual searches of motor vehicles with "find rates" by race/ethnicity for motor vehicle non-consensual searches.⁴⁰⁶

The New Jersey Decree does not remedy all problems (for example, it does not prohibit pretextual stops), but if fully implemented it has the very strong potential of ending racial profiling on the New Jersey Turnpike. The combination of detailed data collection and analysis, limits on consent searches, and mandatory internal and external audits provide powerful tools for reform.⁴⁰⁷

The Philadelphia Police Department Agreement covers a broader range of police practices. Among other provisions, it requires (1) computerization of standard police paperwork and all information relating to citizen complaints, use of force, firearms discharges, and other police activities that may disclose misconduct in a format that permits retrieval of information by officer, district, special squads, and category of police work,⁴⁰⁸ (2) close reviews and audits of narcotics officers, including their applications for search warrants, "find" rates and use of force during searches, surveillance records, and use of informants,⁴⁰⁹ (3) a substantial reform of the procedures of the Internal Affairs Division,⁴¹⁰ (4) accountability of supervisors for the preventable misconduct of police officials,⁴¹¹ and (5) procedures and policies to counter racial bias in policing.⁴¹² On this last issue, the Agreement provides:

A. [S]pecific and detailed training with respect to equal treatment of citizens [and] promulgation of disciplinary regulation[s] for racially biased police work.

B. A Deputy Commissioner [must] (1) monitor police records and complaints as they involve minorities and allegations of racial discrimination, (2) act as a liaison to representatives of minority communities and to officials in the Department dealing with race related issues, and (3)

⁴⁰⁶ *Id.* at 21.

⁴⁰⁷ Without a prohibition on pretextual stops, law enforcement agencies can continue to profile by race, and attempt to "even out" the statistics by stopping sufficient numbers of white drivers.

⁴⁰⁸ Settlement Agreement, NAACP v. City of Philadelphia, *supra* note 395, at 2; City of Philadelphia's Response to Plaintiffs' Proposals for Reforms Within the Philadelphia Police Department, NAACP v. City of Philadelphia, C.A. No. 96-6045 (E.D. Pa. 1996), at 7-8 (on file with author).

⁴⁰⁹ Settlement Agreement, NAACP v. City of Philadelphia, *supra* note 395, at 3-4; City of Philadelphia's Response to Plaintiffs' Proposals, *supra* note 408, at 16-20.

⁴¹⁰ Settlement Agreement, NAACP v. City of Philadelphia, *supra* note 395, at 2; City of Philadelphia's Response to Plaintiffs' Proposals, *supra* note 408, at 3-6.

⁴¹¹ Settlement Agreement, NAACP v. City of Philadelphia, *supra* note 395, at 2; City of Philadelphia's Response to Plaintiffs' Proposals, *supra* note 408, at 3-6.

⁴¹² Settlement Agreement, NAACP v. City of Philadelphia, *supra* note 395, at 2; City of Philadelphia's Response to Plaintiffs' Proposals, *supra* note 408, at 21-29.

monitor programs with respect to hiring and promotion of minorities.

C. [P]edestrian and vehicle stops [are to] be recorded . . . even if the stop does not yield information, detention, evidence or an arrest. Each document must state the reason for the stop, for any police action taken (e.g., frisk, search, questioning), and the race of the person(s) stopped.

[A] review and audit, on a regular basis, [of] the patterns of these stops to determine whether impermissible racial factors are involved. Individuals identified on the police reports, but against whom no charges have been made, should be contacted on a random basis to determine if the police conduct was justified and to examine any possible racial patterns.

D. Individual officers' and supervisors' files (as computerized) should contain any allegations or findings of racial bias. In addition, the records of stops, searches, arrest and civilian complaints in the files should be periodically reviewed to determine whether racial bias or patterns are evident.⁴¹³

V. THE ELEMENTS OF REFORM

Three developments have converged in the past few years with the distinct potential of altering the legal and political landscape of contemporary policing practices. First, there is almost universal condemnation of "racial profiling" and, while the debate as to the proper definition of this term will continue, there is growing support for the principle that race cannot be used to any degree to support a discretionary judgment by a police officer to stop, frisk, or search a suspect, except where a description of a suspect has been provided. Police departments will be pressed to adopt and implement policies prohibiting racial profiling and the courts are likely to intervene where patterns of racial profiling are proven.

Second, for the first time, reliable data are being collected and analyzed with respect to both racial disparities in stops and searches and whether adequate cause exists for the police intrusions. These data are essential to any serious effort to reconsider constitutional doctrine and to address the remedies necessary for racial profiling and other arbitrary police conduct.

Third, effective judicial remedial measures that reflect a more progressive police management philosophy have been adopted and, if properly implemented, hold the promise for significant amelioration of past abuses. Notwithstanding the serious obstacles that make federal injunctive relief far too problematical, strong pleadings and evidentiary showings have resulted in some preliminary adjudications sustaining complaints, certifying class actions, and permitting discovery of critical police department records. Further, the Department of Justice has begun to exercise its powers to litigate pattern and prac-

⁴¹³ Fourth Philadelphia Report, *supra* note 41, at 3.

tice cases of police misconduct and the Department as entered into a number of state of the art consent decrees.

These developments create the potential for bridging the enormous gap between the promises of the Constitution and the realities of street level policing. Ultimately, the abuses will be significantly reduced only where there are fundamental reforms in police policies and practices. The following are essential elements of a reform agenda.

A. Legislative and Administrative Measures

- Racial profiling should be prohibited. Race should not be a permissible factor in the discretionary decision to stop, search, or arrest, unless the police have specific descriptive racial information concerning a suspect.
- Law enforcement agencies should be mandated by law to collect, maintain, and report all relevant data concerning the race of persons stopped and searched, the legal cause for traffic and pedestrian stops and searches, and all relevant circumstances surrounding the stop (e.g., requests for consent, use of narcotics dogs, use of force). The provisions of the pending federal legislation on traffic stop statistics and the terms of the Consent Decrees entered into by the Department of Justice and State of New Jersey should provide models for legislatures and law enforcement agencies.
- Analysis of these data should include a comparison of all relevant categories of racial/ethnic percentages for car stops and searches and of all police investigatory methods used during these stops (with a benchmark racial/ethnic percentage if available).
- Analysis of data concerning pedestrian stops should include the same types of racial/ethnic comparisons for stops, frisks, and searches. Audits should be performed to determine whether stops are being made with adequate cause.
- Pretextual stops should be prohibited. Traffic stops should be made only for observed traffic violations or where adequate cause supports a criminal investigatory stop. The decision to stop should be made independent of race and should not be made on the mere suspicion of drug possession.
- In all circumstances in which consent to search is requested, the person should be informed of her right to refuse consent. All consent requests should be recorded, and all consents should be in writing and signed by the driver, passenger, or pedestrian who was stopped.

B. Doctrinal Reform

- The Fourth Amendment should be construed to prohibit pretextual stops based on the race of the "suspect."
- Statistical evidence of significant racial disparities in stops and searches (controlled for relevant non-racial factors) should be sufficient to state a prima facie case of Fourteenth Amendment and Title VI claims of race discrimination.
- Constitutional standing principles for raising constitutional claims of racial discrimination and for lack of cause of stops and searches should be adjusted to permit federal lawsuits where patterns or practices of unconstitutional conduct are alleged and where plaintiffs have been subjected to the complained-of practices.
- An evidentiary showing of significant numbers of stops without legal justification should provide grounds for class monetary and injunctive relief.
- Discovery rules in criminal procedure proceedings should be substantially broadened to require disclosure of pattern and practice evidence.
- Where categories of conduct that have been recognized as permissible grounds for an investigative stop are demonstrated by empirical evidence to result in extremely low rates of determined criminal conduct, the Court should reconsider the Fourth Amendment standards associated with this conduct.

C. Enforcement

- The Department of Justice should vigorously investigate and litigate pattern and practice police misconduct and should continue to draft and implement consent decrees that advance "best practices" and which effectively control unconstitutional practices.
- Police Departments should ensure that their Internal Affairs Unit conduct investigations of police misconduct with impartiality, integrity, and with the necessary resources. There should be "early warning systems" capable of detecting patterns of misconduct by individual officers or units within the Department. Supervisors should be held accountable for preventable misconduct of line officers.
- Civilian review should be established to ensure competent and vigorous external oversight of allegations of individual and institutional (pattern and practice) misconduct.

* * *

Policing by racial stereotypes and by serendipity has long been the norm in too many locations. The challenge to these long established practices must be multi-faceted and include political, administrative, and legal reform. The integrity of the constitutional framework hangs in the balance.